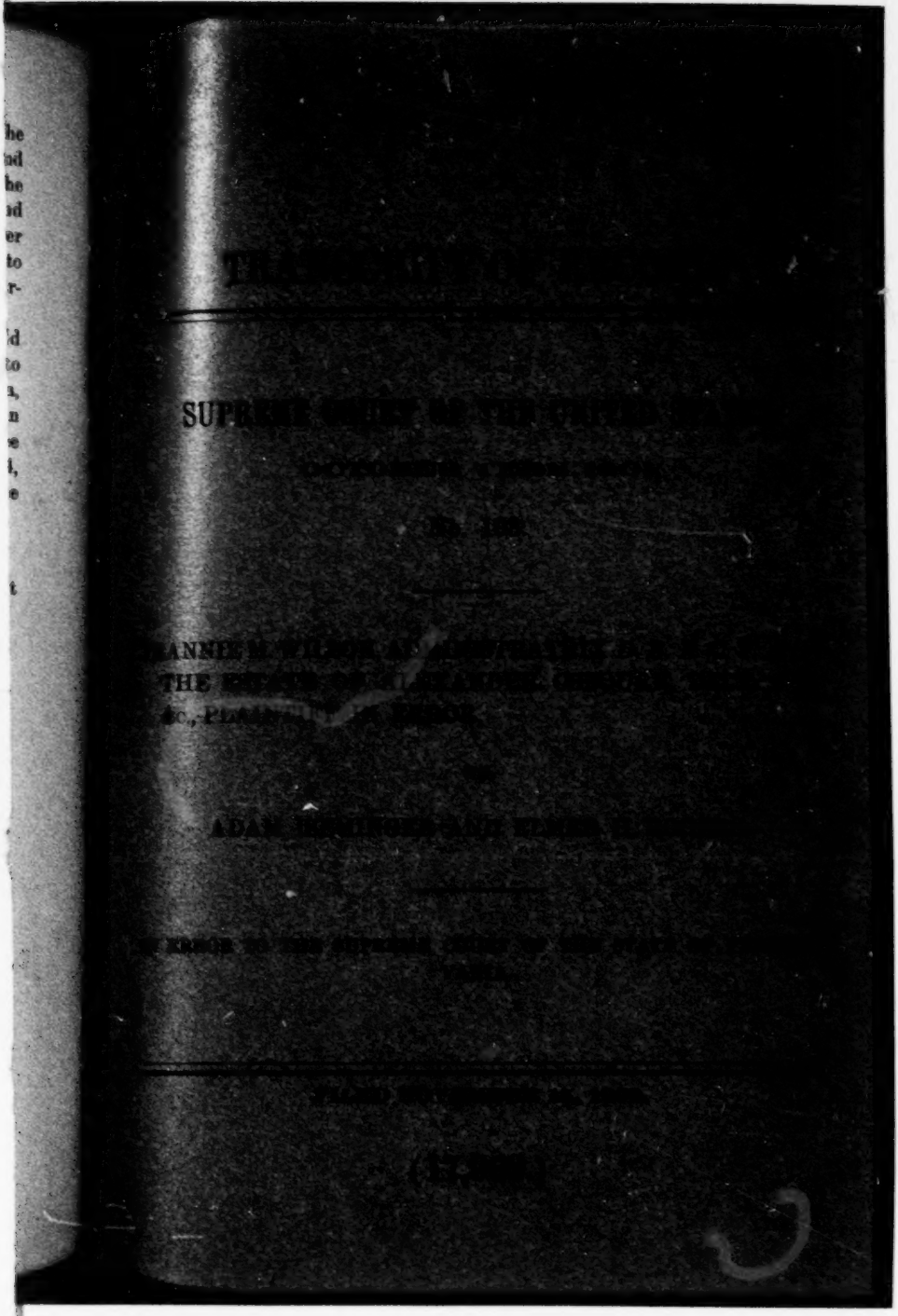

(17,969.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 193.

JEANNIE M. WILSON, ADMINISTRATRIX *D. B. N. C. T. A.* OF THE ESTATE OF ALEXANDER OSBOURN, DECEASED, &c., PLAINTIFF IN ERROR,

vs.

ADAM ISEMINGER AND ELMER H. ROGERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 12, 1901.

1 *Petition for Writ of Error.*

HARRY G. CLAY, Administrator *d. b. n. c. t. a.* of Alexander Osbourn, Deceased, Plaintiff in Error,
vs.
ADAM ISEMINGER and ELMER H. ROGERS, Defendants in Error.

To the Honorable George Shiras, Jr., Justice of the Supreme Court of the United States:

The petition of Jeannie M. Wilson, administratrix *d. b. n. c. t. a.* of Alexander Osbourn, deceased, respectfully showeth:

That Harry G. Clay, administrator *d. b. n. c. t. a.* of Alexander Osbourn, deceased, brought suit in the supreme court of Pennsylvania for the eastern district, entered to January term, 1898, No. 409, by writ of certiorari to an appeal from the judgment of the court of common pleas No. 1 of Philadelphia county, in a suit entered to December term, 1896, No. 240, and wherein the said administrator was plaintiff and Adam Iseminger defendant, and Elmer H. Rogers, terre-tenant; in which suit in the said supreme court of Pennsylvania the said administrator was plaintiff in error and the said Adam Iseminger and Elmer H. Rogers defendants in error.

2 That the said suit in the said court of common pleas No. 1 of Philadelphia county was an action of assumpsit sur-ground-rent deed between Alexander Osbourn and wife and Adam Iseminger, dated the fourth day of January, 1854, and recorded on January 5th, 1854, in the proper office, in Philadelphia, in Deed Book T. H. 127, page 80, &c., to recover the semi-annual arrears of rent due April 1 and October 1 of each and every year from April 1, 1887, to October 1, 1896, inclusive; which suit was pleaded to issue and tried before a judge and jury in said court of common pleas No. 1, and wherein, on November 14th, 1898, the court directed a verdict for the defendant, upon which verdict judgment was subsequently entered in favor of the defendant on, to wit, December 20th, 1898.

That on the third day of April, 1899, the supreme court of Pennsylvania, sitting at Philadelphia, ordered the said judgment to be affirmed, and afterwards, on the third day of April, 1899, the said judgment was duly entered and recorded in the eastern district of Pennsylvania aforesaid.

That since bringing said suit Harry G. Clay has been discharged from his said office as administrator, and letters of administration *de bonis non cum testamento annexo* have been duly granted to your petitioner, Jeannie M. Wilson, who has been duly substituted

3 upon the record.

That the said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania.

That the judgment of the said court is final.

That the right, title, privilege, and immunity claimed by your

petitioner, plaintiff and appellant aforesaid, were claimed under the Constitution of the United States, article 1, section 10, providing, among other things, that no State shall pass any law impairing the obligation of contracts, all of which appears of record.

That the decision and judgment of the supreme court aforesaid was against the right, title, privilege, and immunity so claimed.

Your petitioner therefore prays for the allowance of a writ of error to the supreme court of Pennsylvania, in order that the said judgment of the supreme court of Pennsylvania may be re-examined and reversed or affirmed in the Supreme Court of the United States.

And she will ever pray.

JEANNIE M. WILSON.

4 STATE OF NEW YORK, }
County of New York. }

Jeannie M. Wilson, being duly sworn, deposes and says that the facts in the above petition are true to the best of her knowledge and belief.

[SEAL.] JEANNIE M. WILSON.

Sworn to and subscribed before me this 20th day of July, 1900.

F. A. WILSON,
Notary Public for Kings Co.

Ctf. filed in N. Y. Co.

Endorsement: In the Supreme Court of the United States of America. Jeannie M. Wilson, administratrix, *vs.* Adam Iseminger *et al.* Petition for writ of error. Writ of error allowed as prayed for. M. Hampton Todd, George Henderson.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the supreme court of Pennsylvania, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Harry G. Clay, administrator *de bonis non cum testamento annexo* of the estate of Alexander Osbourn, deceased, plaintiff in error, and Adam Iseminger and Elmer H. Rogers, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in ques-

6 tion the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United

States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Harry G. Clay, administrator *d. b. n. c. t. a.* of the estate of Alexander Osbourn, deceased, as is set forth by Jeannie M. Wilson, administratrix *d. b. n. c. t. a.* of the estate of Alexander Osbourn, deceased, substituted plaintiff in error, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] In the Supreme Court of the United States of America. Jeannie M. Wilson, administratrix of Alexander Osbourn, deceased, plaintiff in error, *vs.* Adam Iseminger and Elmer H. Rogers, defendants in error. Writ of error. M. Hampton Todd, George Henderson.

7 UNITED STATES OF AMERICA, *ss:*

To Adam Iseminger and Elmer H. Rogers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein Jeannie M. Wilson, administratrix *d. b. n. c. t. a.* of the estate of Alexander Osbourn, deceased, substituted for Harry G. Clay, administrator *de bonis non cum testamento annexo* of the estate of Alexander Osbourn, deceased, — plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 29th day of October, in the year of our Lord one thousand nine hundred.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] In the Supreme Court of the United States of America. Jeannie M. Wilson, administratrix, *vs.* Adam Iseminger and Elmer H. Rogers. Citation surwrit of error. M. Hampton Todd, George Henderson.

On this seventh day of November, in the year of our Lord one thousand nine hundred (1900), personally appeared Robert G. Erskine before me, the subscriber, a notary public for the Commonwealth of Pennsylvania, residing in the city of Philadelphia, and makes oath that he delivered a true copy of the within citation to Elmer H. Rogers, the defendant in error and terre-tenant of the premises in question, on the sixth day of November,1900. Adam Iseminger could not be found.

ROBERT G. ERSKINE.

Sworn to and subscribed the 7th day of November, A. D. 1900.

[Seal of Wm. A. Rafferty, Notary Public, Philada., Pa.]

WM. A. RAFFERTY,
Notary Public.

8 *Bond Surwrit of Error to Supreme Court of the United States.*

Know all men by these presents that we, Jeannie M. Wilson, as principal, and The American Bonding and Trust Company of Baltimore City, as surety, are held and firmly bound unto Adam Iseminger and Elmer H. Rogers in the full and just sum of five hundred dollars, to be paid to the said Adam Iseminger and Elmer H. Rogers, their and each of their certain attorney-, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of July, in the year of our Lord one thousand nine hundred.

Whereas lately, at a court of common pleas No. 1 in and for the county of Philadelphia, in a suit depending in said court between Harry G. Clay, administrator *d. b. n. c. t. a.* of Alexander Osbourn, deceased, and Adam Iseminger, defendant, and Elmer H. Rogers, terre-tenant, a judgment was rendered against the said Harry G. Clay, administrator *d. b. n. c. t. a.* of Alexander Osbourn, deceased, and the said Jeannie M. Wilson, administratrix *d. b. n. c. t. a.* of Alexander Osbourn, deceased, substituted plaintiff in error, having obtained a writ of error and filed a copy thereof in the clerk's office of the said

court to reverse the judgment in the aforesaid suit, and a cita-
9 tion directed to the said Adam Iseminger and Elmer H. Rogers, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said Jeannie M. Wilson shall prosecute the said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JEANNIE M. WILSON. [SEAL.]
THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By JAS. BOND, *President.* [SEAL.]

Attest: SAMUEL H. SHINN, *Secretary.*

Sealed and delivered in presence of—
FRANCES M. BOWEN.
JAMES W. LOCKHART.

Approved:
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

(2½ cts. U. S. revenue stamps, duly canceled.)

Endorsement: In the Supreme Court of the United States of America. Jeannie M. Wilson, administratrix, *vs.* Adam Iseminger and Elmer H. Rogers. Bond surwrit of error. M. Hampton Todd, George Henderson.

10 STATE OF MARYLAND, } *ss:*
City of Baltimore, }

On this 26th day of July, A. D. 1900, before me, the subscriber, Howard Abrahams, a commissioner for the State of Pennsylvania, duly appointed to take proof and acknowledgment of deeds and other instruments, came James Bond, president, and Samuel H. Shriver, secretary of the American Bonding and Trust Company of Baltimore City, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledged the execution of the same, and, being by me duly sworn, severally and each for himself deposeth and saith that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year first above written.

[SEAL.] HOWARD ABRAHAMS,
Commissioner of Deeds for the State of Pennsylvania in Maryland.

Endorsement: In the Supreme Court of the United States of America. Jeannie M. Wilson, adm., *vs.* Adam Iseminger *et al.* Bond surwrit of error. M. Hampton Todd, George Henderson.

11 Supreme Court of Pennsylvania, Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania in and for the eastern district, *inter alia*, the following is thus contained:

Appearance Docket.

Docket entries.

January Term, 1898, No. 409.

George Henderson.	HARRY G. CLAY, Administrator *d. b. n. c. t. a.* of Alexander Osbourn, Deceased, Plaintiff,	Appeal from the court of common pleas No. 1 of the county of Philadelphia.
409.	*vs.*	Filed December 20, 1898.
	ADAM ISEMINGER, Defendant; Elmer H. Rogers, Terre-tenant.	*Eo die.* Certiorari exit.
		Ret'ble the first Monday of February, 1899.
	Appeal of plaintiff.	January 7, 1899. Record returned and filed.
		February 4, 1899. Assignments of error filed.
12	(C. P. 240, Dec. term, 1896.)	March 21, 1899. Argued.
		April 3, 1899. Judgment affirmed.
		Per curiam.
		(S.)
		Apr. 4, 1899. Remittitur exit and with record and copy of opinion sent to the prothonotary of Philadelphia county.
		A. M. S.
		And now, October 23rd, 1899, Harry G. Clay having been discharged from his said office of administrator, and Jeannie M. Wilson having been duly appointed to the said office, the substitution of the said Jeannie M. Wilson, administratrix *de bonis non cum testamento annexo*, as plaintiff in error, is hereby suggested in place of the said Harry G. Clay, administrator, etc., with the same effect as if the proceedings had originally been instituted by her.
		GEORGE HENDERSON, Esq., *Attorney for Jeannie M. Wilson, Administratrix d. b. n. c. t. a.*

October 23, 1899. Certiorari exit.
October 31, 1899. Record returned and filed.
13 July 11, 1900. Appearance for Jeannie M. Wilson, administratrix *d. b. n. c. t. a.* of Alexander Osbourn, deceased, substituted plaintiff and appellant, filed.

GEORGE HENDERSON, Esq.,
Att'y for Jeannie M. Wilson, Adm'x, &c.

July 11, 1900. Petition for the allowance of appeal to the Supreme Court of the United States filed on motion of George Henderson, Esq.
July 11, 1900. Being of opinion that no Federal question is involved, I refuse this petition for writ of error.

HENRY GREEN,
Chief Justice, Supreme Court of Pennsylvania.

November 1st, 1900. Petition for writ of error to the Supreme Court of the United States brought into office.
Eo die. Writ of error, allowed by Justice Shiras, brought into office.
Eo die. Bond in the sum of five hundred dollars filed.

Appeal and Affidavit.

In the Supreme Court of Pennsylvania for the Eastern District.

14 HARRY G. CLAY, Administrator *d. b. n. c. t. a.* of Alexander Osbourn, Deceased, Plaintiff, — ADAM ISEMINGER, Defendant, and ELMER H. Rogers, Terre-tenant, Defendant.	Court of Common Pleas No. 1 of the County of Philadelphia, Dec. Term, 1896. No. 240.

Enter appeal on behalf of Harry G. Clay, administrator, &c., from the judgment of the court of common pleas No. 1 of the county of Philadelphia.

GEORGE HENDERSON,
Att'y for Appellant.

To Charles S. Greene, proth'y sup. ct., E. D.

15 COUNTY OF PHILADELPHIA, *ss:*

Harry G. Clay, being duly sworn, saith that said appeal is not taken for the purpose of delay, but because appellant believes he has suffered injustice by the judgment from which he appeals.

H. G. CLAY.

Sworn and subscribed this 7th day of Dec., A. D. 1898.

ALFRED H. WILLIAMS,
Notary Public.

[SEAL.]

Endorsement: No. 409, January term, 1898, supreme court of Pennsylvania, eastern district. Harry G. Clay, adm., &c., *v.* Adam Iseminger, &c.; Elmer H. Rogers. Appeal and affidavit. Filed Dec. 20, 1898, in supreme court. George Henderson.

Præcipe for Certiorari.

In the Supreme Court of Pennsylvania for the Eastern District.

HARRY G. CLAY, Adm., &c., Appellant, — ADAM ISEMINGER ET AL. } Certiorari to the Court of Common Pleas No. 1 of the County of Philadelphia, of December Term, 1896. No. 240.

Issue certiorari to the court of common pleas No. 1 of the county of Philadelphia to bring up record and proceedings in a certain action in said court, No. 240, Dec. term, 1896, wherein Harry G. Clay, administrator *d. b. n. c. t. a.* of Alexander Osbourn, —
16 plaintiff and Adam Iseminger defendant and Elmer H. Rogers terre-tenant.

Returnable to next term, *sec. reg.*

GEORGE HENDERSON,
Attorney for Appellant.

To Charles S. Greene, proth'y sup. court, E. D.

Endorsement: No. 409, January term, 1898, supreme court of Pennsylvania, eastern district. H. G. Clay, adm., &c., *v.* Adam Iseminger, &c.; Elmer H. Rogers. Præcipe for certiorari. Filed Dec. 20, 1898, in supreme court. George Henderson.

RECORD.

Exemplification.

PHILADELPHIA COUNTY, *State of Pennsylvania,* } *sct:*

Among the records and proceedings of the court of common pleas No. one for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. 240, December term, 1896, to wit:

17

Docket Entries.

December Term, 1896.

Henderson.

HARRY G. CLAY, Administrator *d. b. n. c. t. a.* of the Estate of Alexander Osbourn, Dec'd, the said Harry G. Clay Having Been Duly Appointed in Place of Joseph A. Clay, Who Was Duly Appointed Administrator *c. t. a.* of said Estate in Place of Lewis G. Osbourn and Mahlon D. Levinsetter, Who Were the Executors Named in the Last Will and Testament of said Alexander Osbourn and Who Renounced Their Right to Act,

vs.

ADAM ISEMINGER.

240.
J. W. Martin.
Jan. 18, '97. S. C. costs, $3.

Nov. 28, 1896. Statement and aff't filed.

Jan. 28, 1897. Aff't of defence filed.

Dec. 28, 1897. Amendment to statement filed.

Jan. 21, 1898. Bill of exceptions filed.

Eo die. Certificate filed certifying that the value of the property and matter really in controversy in this case is greater than $1,000, exclusive of costs.

Oct. 5, 1898. Plea filed.

Jan. 30, 1897. By writing filed J. W. Martin withdraws his appearance for def't.

S. C. costs, $3.

Dec. 7, 1898. Bill of exceptions filed.

Eo die Certificate of amount in controversy filed.

Dec. 5, 1898. Transcript of stenographer's notes filed.

Sum's assumpsit sur ground rent; deed dated Jan'y 4, 1854; rec. same day in D. B. T. H. No. 127, p. 80, &c.

Will, dated May 5, 1884, reg. in W. B. No. 56, p. 44, &c.

Exit Nov. 28, 1896.

Ret. 1 Mon. Dec., 1896: *Nihil habet.*

Dec. 12, 1896. Al's sum's exit.

Ret. 1 Mon. Jan'y, 1897; served Jno. E. Giles, tenant, and by advertising, and *nihil habet* — to def't.

Jan. 22, 1897. Rule for leave to Elmer E. Rogers to intervene and defend *pro interesse sur*, all proceedings to stay.

Jan. 30, 1897. Rule absolute.

Dec. 28, 1897. Rule on defendants to show cause why judg't should not be entered for want of a suff. aff't of defence.

Eo die. Reasons filed.

Jan. 15, 1898. Rule discharged.

Jan. 28, 1898. Certiorari from S. C. of Jan'y, 1898, No. 63, bro't into office.

Feb'y 2, 1898. Record to S. C. exit.

July 29, 1898. Record returned and remittitur from S. C. filed certifying judgment affirmed.

Nov. 14, 1898. Jury called.

Eo die. Verdict for defendant.

Nov. 17, 1898. Motion for a rule for a new trial; *eo die*, reasons filed.

Dec. 6, 1898. Rule discharged.

Dec. 20, 1898. Jury fee p'd by pl't'ff.

Eo die. Judgment.

Dec. 21, 1898. Certiorari from S. C. of Jan'y, 1898, No. 409, bro't into office.

18

Dec. 28, 1898. Record to S. C. exit.

April 6, 1899. Record returned and remittitur from S. C. filed certifying judgment affirmed.

Oct. 23, 1899. Certiorari from S. C. of Jan'y T., 1898, No. 409, bro't into office.

Certified from the record this 30th day of Oct., A. D. 1899.

[SEAL.]

JOHN L. BURNS,
Pro Prothonotary C. C. P.

(Revenue stamp.)

Exemplification.

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

Among the records and proceedings of the court of common pleas No. 1 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. 240, December term, 1896, to wit:

Docket Entries.

December Term, 1896.

Henderson. 19 240. J. W. Martin. Jan'y 18, '97. Jan'y 30, 1897, by writing filed, J. W. Martin withdraws his appearance for def't. S. C. costs, $3.	HARRY G. CLAY, Administrator *d. b. n. c. t. a.* of the Estate of Alexander Osbourn, Dec'd, the said Harry G. Clay Having Been Duly Appointed in Place of Joseph A. Clay, Who Was Duly Appointed Administrator *c. t. a.* of said Estate in Place of Lewis G. Osbourn and Mahlon D. Livinsetter, Who Were the Executors Named in the Last Will and Testament of said Alexander Osbourn and Who Renounced Their Right to Act, *vs.* ADAM ISEMINGER. Nov. 28, 1896. Statement and aff't filed. Jan. 28, 1897. Aff't of defence filed. Dec. 28, 1897. Amendment to statement filed. Jan. 21, 1898. Bill of exceptions filed. *Eo die.* Certificate filed certifying that the value of the property and matter really in controversy in this case is greater than $1,000, exclusive of costs. Oct. 5, 1898. Plea filed. Dec. 7, 1898. Bill of exceptions filed. *Eo die.* Certificate of amount in controversy filed. Dec. 5, 1898. Transcript of stenographer's notes filed.	Sum's assumpsit sur ground rent; deed dated Jan. 4, 1854; rec. same day in D. B. T. H. No. 127, p. 80, &c. Will, dated May 5, 1854, reg. in W. B. No. 56, p. 44, &c. Exit Nov. 28, 1896. Ret. 1 Mon. Dec., 1896: *Nihil habet.* Dec. 12, 1896. Al's sum's exit. Ret. 1 Monday Jan'y, 1897; served John E. Giles, tenant, and *nihil habet* as to def't. Jan'y 22, 1897. Rule for leave to Elmer E. Rogers to intervene and defend *pro interesse suo*, all proceedings to stay. Jan. 30, 1897. Rule absolute. Dec. 28, 1897. Rule on defendants to show cause why judgment should not be entered for want of a suft. aff. of defence. *Eo die.* Reason- filed Jan. 15, 1898. Rule discharged. Jan. 28, 1898. Certiorari from S. C. of Jan., 1898, No. 63, bro't into office. Feb'y 2, '98. Record to S. C. exit. July 29, 1898. Record returned & remittitur from S. C. filed certifying judgment affirmed Nov. 14, 1898. Jury called. *Eo die.* Verdict for defendant. Nov. 17, 1898. Motion for a rule for a new trial. *Eo die.* Reasons filed. Dec. 6, 1898. Rule discharged. Dec. 20, 1898. Jury fee p'd by pl'ff. *Eo die.* Judgment. Dec. 21, 1898. Certiorari from S. C. of Jan'y T., 1898, No. 409, bro't into office.

Certified from the record this 28th day of Dec., 1898.

[SEAL.]

JOHN L. BURNS,
Pro Prothonotary.

(Revenue stamp.)

Exemplification.

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

Among the records and proceedings of the court of common pleas No. 1 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. 240, December term, 1896, to wit:

20 *Docket Entries.*

December Term, 1896.

Henderson. 240. J. W. Martin. Jan'y 18, '97. Jan. 30, 1897, by writing filed, J. W. Martin withdraws his appearance for deft.	HARRY G. CLAY, Administrator *d. b. n. c. t. a.* of the Estate of Alexander Osbourn, Dec'd, the said Harry G. Clay Having Been Duly Appointed in Place of Joseph A. Clay, Who Was Duly Appointed Administrator *c. t. a.* of said Estate in Place of Lewis G. Osbourn and Mahlon L. Levinsetter, Who Were the Executors Named in the Last Will and Testament of said Alexander Osbourn and Who Renounce Their Right to Act, *vs.* ADAM ISEMINGER. Nov. 28, 1896. Statement and aff't filed. Jan. 28, 1897. Aff't of defence filed. Dec. 28, 1897. Amendment to statement filed. Jan. 21, 1898. Bill of exceptions filed. *Eo die.* Certificate filed certifying that the value of the property and matter really in controversy in this case is greater than $1,000, exclusive of costs.	Sum's assumpsit sur ground rent; deed dated Jan. 4, 1854; rec. same day in D. B. T. H. No. 127, p. 80, &c. Will dated May 5, 1854, reg. in W. B. No. 56, p. 44, &c. Exit Nov. 28, 1896. Ret. 1 Mon. Dec., 1896: *Nihil habet.* Dec. 12, 1896. Al's sum's exit. Ret. 1 Mon. Jan'y, 1897. Served Jno. E. Giles, tenant, and by advertising and *nihil habet* as to def't. Jan. 22, 1897. Rule for leave to Elmer E Rogers to intervene and defend *pro interesse suo*, all proceedings to stay. Jan. 30, 1897. Rule absolute. Dec. 28, 1897. Rule on defendant to show cause why judgment should not be entered for want of a suff. aff't of defence. *Eo die.* Reasons filed. Jan. 15, 1898. Rule discharged. Jan. 28, 1898. Certiorari from S. C. of Jan'y, 1898, No. 63, bro't into office.

Certified from the record this 31st day of January, A. D. 1898.
[SEAL.] JOHN L. BURNS,
Pro Prothonotary.

21 *Summons.*

COUNTY OF PHILADELPHIA, } *ss:*
The Commonwealth of Pennsylvania, }

[SEAL.] To the sheriff of the county of Philadelphia, Greeting:

We command you, as before we did, that you summon Adam Iseminger, late of your county, so that he be and appear before our judges, at Philadelphia, at our court of common pleas No. 1 of the county of Philadelphia, to be holden at Philadelphia, in and for

said county, on the first Monday of January next, there to answer Harry G. Clay, administrator *de bonis non cum testamento annexo* of the estate of Alexander Osbourn, deceased, the said Harry G. Clay having been duly appointed by the register of wills for the county of Philadelphia on the thirtieth day of April, 1892, in place of Joseph A. Clay, who was duly appointed by the said register of wills administrator *cum testamento annexo* on the twenty-seventh day of June, 1860, in place of Lewis G. Osbourn and Mahlon D. Livinsetter, who were the executors named in the last will and testament of the said Alexander Osbourn, who renounced their right to act, of a plea of assumpsit sur-ground-rent deed between Alexander Osbourn and Jennie M., his wife, and the said Adam Iseminger, dated January 4th, 1854, recorded January 4th, 1854, in the proper office, at Philadelphia, in Deed Book T. H. No. 127, p. 80, &c., wherein the
22 said Alexander Osbourn conveyed to the said Adam Iseminger the premises now described:

All that certain lot or piece of ground situate on the south side of a certain street twenty-five feet wide, called State street, running from Delaware Seventh to Delaware Eighth streets between Wharton and Reed streets, in the district of Southwark, county of Philadelphia, at the distance of one hundred ninety-seven feet westward from the west side of said Seventh street, containing in front or breadth on the said State street eighty-four feet and extending of that width southward in length or depth between lines parallel to the said Seventh street on the east line thereof twenty-two feet three inches and on the west line thereof eight feet three inches, more or less; bounded northward by the said State street, southward by ground formerly of Ann James, eastward by ground granted to Thomas H. Adams on ground rent, southward by other ground formerly of the late Alexander Osbourn, reserving thereout the yearly ground rent of seventy-two dollars ($72.00), payable half yearly on the first days of April and October, to him, the said Alexander Osbourn, his heirs and assigns, and the said Adam Iseminger in the said grount-rent deed duly covenanted to pay the said ground rent, as therein will more fully appear; and the said Alexander Osbourn, being so thereof seized, departed this life on or about the 1st day of May, 1859, having first made and published his last will and testament in writing, bearing date the 6th day of May, 1854,
23 and since his decease duly proved and registered at Philadelphia, in Will Book No. 56, p. 44, etc., wherein and whereby he gave to his executors therein named the power to sell any or all of his real estate and give to the purchasers thereof good and sufficient acquittance in law, as by reference to said will and the record thereof more fully and at large appears, and by said will the said Alexander Osbourn appointed Lewis G. Osbourn and Mahlon D. Livinsetter to be the executors thereof; which appointment they renounced, and Joseph A. Clay was duly appointed administrator thereof *cum testamento annexo;* and the said Joseph A. Clay, administrator, as aforesaid, departed this life in the year 1881, whereupon the register of wills for the county of Philadelphia aforesaid, on the 30th day of April, 1892, appointed Harry G. Clay administrator

de bonis non cum testamento annexo; all of which, by reference to the records of said register of wills, will more fully and at large appear; and to have you then and there this writ.

Witness the Honorable Craig Biddle, president judge of our said court, at Philadelphia, the 12th day of December, in the year of our Lord one thousand eight hundred and ninety-six (1896).

J. U. G. HUNTER,
Pro Prothonotary.

24 Endorsement: 240, Dec. term, 1896, court of common pleas No. 1. Harry G. Clay, adm'r, &c., *vs.* Adam Iseminger, N. H. State street, 7th bet. Wharton & Reed Sts. Alias summons assumpsit sur-ground-rent deed, 197 feet west from west side of 7th St. Geo. Henderson.

Served John E. Giles, the tenant in possession of the premises described in a certain paper hereto annexed, marked "A," by leaving December 28th, 1896, a true and attested copy of the within writ, at his dwelling-house, with an adult member of his family, and by advertising the same once a week for two successive weeks in the Evening Star, a daily paper published in the city of Philadelphia, agreeably to the act of assembly and rules of court in such cases made and provided, and an abstract in the "Legal Intelligencer," and *nihil habet* as to defendant.

So answers—

W. F. WILKINS,
Deputy Sheriff.
SAM'L M. CLEMENT, *Sheriff.*

12, 28, '96. As to John E. Giles, 724 Upper Medina, tenant in possession. Jennings.

HARRY G. CLAY, Administrator *d. b. n. c. t. a.* of the Estate of Alexander Osbourn, Deceased, the said Harry G. Clay Having Been Duly Appointed in Place of Joseph A. Clay, Who Was Duly Appointed Administrator *c. t. a.* of said Estate in Place of Lewis G. Osbourn and Mahlon D. Livinsetter, Who Were the Executors Named in the Last
25 Will and Testament of said Alexander Osbourn, and Who Renounced Their Right to Act,
vs.
ADAM ISEMINGER.

C. P. No. —, —— Term, 1896. No. —.

To the prothonotary, court of common pleas, Philadelphia county.

SIR: Issue summons in an action of assumpsit returnable *sec. leg.* for recovery of the arrears of ground rent due by Adam Iseminger on the ground-rent deed between Alexander Osbourn and Jennie M.

his wife, and the said Adam Iseminger, dated January 4th, 1854, recorded January 4th, 1854, in the proper office at Philadelphia, in Deed Book T. H. No. 127, p. 80, &c., wherein the said Alexander Osbourn conveyed to the said Adam Iseminger the premises now described:

All that certain lot or piece of ground situate on the south side of a certain street twenty-five (25) feet wide, called State street, running from Delaware Seventh to Delaware Eighth streets between Wharton and Reed streets, in the district of Southwark, county of Philadelphia, at the distance of one hundred ninety-seven (197) feet westward from the west side of the said Seventh street, con-
26 taining in front or breadth on the said State street eighty-four (84) feet and extending of that width southward in length or depth between lines parallel to the said Seventh street on the east line thereof twenty-two feet three inches (22′ 3″) and on the west line thereof eight feet three inches (8′ 3″), more or less; bounded northward by the said State street, southward by ground formerly of Ann James, eastward by ground granted to Thomas H. Adams on ground rent, southward by other ground formerly of the late Alexander Osbourn, reserving thereout the yearly ground rent of seventy-two dollars ($72.00), payable half yearly on the first days of April and October to him, the said Alexander Osbourn, his heirs and assigns, and the said Adam Iseminger in the said ground-rent deed duly covenanted to pay the said ground rent, as therein will more fully appear, and the said Alexander Osbourn, being so thereof seized, departed this life on or about the 1st day of May, 1859, having first made and published his last will and testament in writing, bearing date the 6th day of May, 1854, and since his decease duly proved and registered at Philadelphia in Will Book No. 56, p. 44, etc., wherein and whereby he gave to his executors therein named the power to sell any or all of his real estate, and give to the purchasers thereof good and sufficient acquittances in law, as by reference to said will and the record thereof more fully and at large appears; and by said
27 will the said Alexander Osbourn appointed Lewis G. Osbourn and Mahlon D. Livinsetter to be the executors thereof, which appointment they renounced, and Joseph A. Clay was duly appointed administrator thereof *cum testamento annexo;* and the said Joseph A. Clay, administrator as aforesaid, departed this life in the year 1881, whereupon the register of wills for the county of Philadelphia aforesaid, on the 30th day of April, 1892, appointed Harry G. Clay administrator *de bonis non cum testamento annexo;* all of which, by reference to the records of said register of wills, will more fully and at large appear.

And the said Harry G. Clay, administrator *de bonis non cum testamento annexo,* claims herein to recover arrears of the said ground rent as per the following—

Statement.

Six months' rent, under ground-rent deed between Alexander Osbourn and Adam Iseminger, dated and recorded as above stated, due April 1st, 1887	$36.00
Six months' ground rent, under same, due October 1st, 1887	36.00
Ditto, due April 1st, 1886	36.00
" " October 1st, 1888	36.00
" " April 1st, 1889	36.00
" " October 1st, 1889	36.00
" " April 1st, 1890	36.00
28	
" " October 1st, 1890	36.00
" " April 1st, 1891	36.00
" " October 1st, 1891	36.00
" " April 1st, 1892	36.00
" " October 1st, 1892	36.00
" " April 1st, 1893	36.00
" " October 1st, 1893	36.00
" " April 1st, 1894	36.00
" " October 1st, 1894	36.00
" " April 1st, 1895	36.00
" " October 1st, 1895	36.00
" " April 1st, 1896	36.00
" " October 1st, 1896	36.00

With interest on each arrear.

GEORGE HENDERSON,
Attorney for Plaintiff.

11, 27, '96.

Harry G. Clay, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing præcipe and statement are true to the best of his knowledge and belief.

H. G. CLAY.

29 Sworn to and subscribed before me this 25th day of November, A. D. 1896.

ALFRED H. WILLIAMS,
Notary Public.

[SEAL.]

Endorsement: No. 240, Dec. term, 1896, C. P. 1. Harry G. Clay, administrator *d. b. n. c. t. a.* of Alexander Osbourn, dec'd, *vs.* Adam Iseminger. Præcipe, statement, and affidavit. Filed Nov. 26, 1896. Hunter, pro proth'y. Filed Nov. 28, 1896. Pro proth'y. Henderson.

CLAY, Administrator *d. b. n. c. t. a.*, &c.,
vs.
ADAM ISEMINGER, Defendant, and ELMER H. ROGERS, Terre-tenant.
} C. P. No. 1, Dec. Term, 1896. No. 240.

Amendment to Plaintiff's Statement.

And now, November 30th, 1897, George Henderson, attorney for the plaintiff, and Alexander Simpson, Jr., attorney for Rogers, terre-tenant, agree that the statement filed in the above-entitled case shall be amended as follows:

On page one, sixteenth line from the bottom, after "in Deed Book T. H. No. 127, p. 80, &c.," insert "a copy of which deed is here-
30 unto annexed, marked 'Exhibit A' and made part hereof."

And at the end of the statement add the following:

"EXHIBIT A."

Alexander Osbourn *et ux.*
to
Adam Iseminger.
} Deed Book T. H. 127, p. 80, &c.

This indenture made the fourth day of January, in the year of our Lord one thousand eight hundred and fifty-four, between Alexander Osbourn of the city of Philadelphia, gentleman, and Jeannie M. his wife, of the one part, and Adam Iseminger, of the district of Southwark and county of Philadelphia, carpenter, of the other part:

Witnesses that the said Alexander Osbourn and Jeannie M. his wife, as well for and in consideration of the sum of one dollar lawful money unto them at or before the sealing and delivery hereof by the said Adam Iseminger well and truly paid, the receipt whereof is hereby acknowledged, as of the payment of the yearly rent and taxes and performance of the covenants and agreements hereinafter mentioned, which on the part of the said Adam Iseminger, his heirs and assigns, is and are to be paid and performed, have granted, bargained, sold aliened, enfeoffed, released and confirmed, and by these presents do grant bargain, sell, alien, enfeoff, release
31 and confirm unto the said Adam Iseminger, his heirs and assigns, all that certain lot or piece of ground situate on the south side of a certain street twenty feet wide called State street, running from Delaware Seventh to Eighth streets between Wharton and Reed streets in the district of Southwark and county of Philadelphia, at the distance of one hundred and ninety-seven feet westward from the west side of the said Seventh street containing in front or breadth on the said State street, eighty-four feet and extending of that width southward in length or depth between lines parallel with said Seventh street on the east line thereof twenty-two feet three inches and on the west line thereof eighty feet three inches more or less, bounded northward by the said State street, southward by ground formerly of Ann James and now or late of John K. McCurdy,

eastward by ground granted to Thomas H. Adams on ground rent, and westward by other ground of the said Alexander Osbourn (being part of a larger lot of ground which William Deal, Esquire, high sheriff of the city and county of Philadelphia, by deed-poll under his hand and seal, dated the twenty-third day of March, anno Domini, one thousand eight hundred and fifty, duly executed and acknowledged in open district court for the said city and county on the same day and entered among the records thereof in Sheriff's Deed Book W. page 326 &c., granted and conveyed *inter alia*
32 unto the said Alexander Osbourn in fee, the same having been taken in execution and sold by the said sheriff as the property of Howard Hinchman and Richard W. Steel.)

Together with all and singular the ways, streets, alleys, passages, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever unto the said hereby-granted premises belonging or in anywise appertaining, and the reversions and remainders thereof.

To have and to hold the said described lot or piece of ground, hereditaments and premises hereby granted with the appurtenances unto the said Adam Iseminger, his heirs and assigns to the only proper use and behoof of the said Adam Iseminger, his heirs and assigns forever.

Yielding and paying therefor and thereout unto the said Alexander Osbourn, his heirs and assigns. the yearly rent or sum of seventy-two dollars lawful money of the United States of America in half-yearly payments on the first day of April and October in every year hereafter forever without any deduction, defalcation or abatement for any taxes, charges or assessments whatsoever to be assessed as well on the said hereby-granted premises as on the said yearly rent hereby and thereout reserved. The first half-yearly payment thereof to be made on the first day of October one thousand eight
33 hundred and fifty-four and on default of paying the said yearly rent on the days and time and in manner aforesaid it shall and may be lawful for the said Alexander Osbourn, his heirs and assigns, to enter into and upon the said hereby-granted premises or any part thereof and into the buildings thereon to be erected and to distrain for the said yearly rent so in arrear and unpaid without any exemption whatsoever, any law to the contrary thereof in anywise notwithstanding, and to proceed with and sell such distrained goods and effects according to the usual course of distresses for rent charges. But if sufficient distress cannot be found upon the said hereby-granted premises to satisfy the said yearly rent in arrear and the charges of levying the same, then and in such case it shall and may be lawful for the said Alexander Osbourn, his heirs and assigns, into and upon the said hereby-granted lot and all improvements wholly to re-enter and the same to have again, repossess and enjoy as in his and their first and former estate and title in the same and as though this indenture has never been made.

And the said Adam Iseminger for himself, his heirs, executors,

administrators and assigns doth covenant, promise and agree to and with the said Alexander Osbourn, his heirs and assigns, by
34 these presents that he, the said Adam Iseminger, his heirs and assigns, shall and will well and truly pay or cause to be paid to the said Alexander Osbourn, his heirs and assigns, the aforesaid yearly rent or sum of seventy-two dollars lawful money aforesaid on the days and times hereinbefore mentioned and appointed for payment thereof, without any deduction, defalcation or abatement for any taxes, charges or assessments whatsoever, it being the express agreement of the said parties that the said Adam Iseminger, his heirs and assigns, shall pay all taxes whatsoever that shall hereafter be laid, levied or assessed by virtue of any laws whatever, as well on the said hereby-granted lot and buildings thereon to be erected as on the said yearly rent now charged thereon. Also that he, the said Adam Iseminger, his heirs and assigns, shall and will within one year from the date hereof erect and build on the said hereby-granted lot good and sufficient brick dwelling-houses to secure the said yearly rent hereby reserved. And the said grantee for himself, his heirs and assigns, doth hereby expressly waive the benefit of any and every law that might exempt said premises from levy and sale under execution or any part of the proceeds thereof from the payment of said rent. Provided always, nevertheless, that if the said Adam Iseminger, his heirs or assigns shall and do at any time hereafter pay or cause to be paid to the said Alexander Osbourn, his heirs or assigns, the sum of twelve hundred dollars lawful money as aforesaid and the
35 arrearages of the said yearly rent to the time of such payment, then the same shall forever thereafter cease and be extinguished and the covenant for payment thereof shall become void, and then he, the said Alexander Osbourn, his heirs or assigns shall and will at the proper costs and charges in the law of the said grantee, his heirs or assigns, seal and execute a sufficient release and discharge of the said yearly rent hereby reserved to the said Adam Iseminger, his heirs and assigns, forever, anything hereinbefore contained to the contrary thereof notwithstanding. And the said Alexander Osbourn, for himself, his heirs, executors and administrators, doth promise and agree to and with the said Adam Iseminger, his heirs and assigns, by these presents, that he, the said Adam Iseminger, his heirs and assigns, paying the said yearly rent or extinguishing the same and taxes and performing the covenants and agreements aforesaid, shall and may at all times hereafter forever freely, peaceably and quietly have, hold and enjoy all and singular the premises hereby granted with the appurtenances, and receive and take the rents and profits thereof without any molestation, interruption or eviction of him, the said Alexander Osbourn, or of his heirs, or of any other person or persons whomsoever lawfully claiming or to claim by, from or under him, them, or any of them, or by or with his, their, or any of their act, means, consent or procurement.

In witness whereof the said parties to these presents have
36 hereunto interchangeably set their hands and seals the day and year first above written.

ALEX. OSBOURN. [SEAL.]
JEANNIE M. OSBOURN. [SEAL.]
ADAM ISEMINGER. [SEAL.]

Sealed and delivered in the presence of us.

C. BRAZER.
THOMAS BOYLE, JR.

The fourth day of January, anno Domini 1854, before me, one of the aldermen for the city of Philadelphia, State of Pennsylvania, came the above-named Alexander Osbourn and Jeannie M., his wife, and Adam Iseminger, and in due form of law acknowledged the above indenture to be their act and deed and desired the same might be recorded as such. The said Jeannie M., being of full age, separate and apart from her said husband by me examined, declared that she did voluntarily and of her own free will and accord seal and as her act and deed deliver the said indenture without any coercion or compulsion of her said husband, the contents thereof having first been by me fully made known unto her.

Witness my hand and seal the day and year above.

C. BRAZER, *Ald.* [SEAL.]

Recorded 5th January, 1854.

GEORGE HENDERSON,
Att'y for Plaintiff.
ALEX. SIMPSON, JR.,
Att'y for Rogers, Terre-tenant.

37 Endorsement: 240, December term, 1896, C. P. 1. Clay *v.* Iseminger. Amendment to plaintiff's statement. Filed Dec. 28, 1897. J. Briggs, pro proth'y. George Henderson. Service accepted. Alex. Simpson, Jr., att'y for terre-tenant.

HARRY G. CLAY, Administrator *d. b. n. c. t. a.* of the Estate of Alexander Osbourn, Deceased, the said Harry G. Clay Having Been Duly Appointed in Place of Joseph A. Clay, Who Was Duly Appointed Administrator *c. t. a.* of said Estate in Place of Lewis G. Osbourn and Mehlon D. Livinsetter, Who Were the Executors Named in the Last Will and Testament of said Alexander Osbourn, Who Renounced Their Right to Act,

vs.

ADAM ISEMINGER.

C. P. No. 1, December Term, 1896. No. 240.

To the prothonotary, court of common pleas, Philadelphia county.

SIR: Issue alias summons in an action of assumpsit, returnable *sec. leg.*, for recovery of the arrears of ground rent
38 due by Adam Iseminger on the ground-rent deed between Alexander Osbourn and Jennie M., his wife, and the said Adam Iseminger, dated January 4th, 1854, recorded January 4th, 1854, in the proper office at Philadelphia, in Deed Book T. H. No. 127, p. 80, &c., wherein the said Alexander Osbourn conveyed to the said Adam Iseminger the premises now described:

All that certain lot or piece of ground situate on the south side of a certain street twenty-five feet wide, called State street, running from Delaware Seventh to Delaware Eighth streets, between Wharton and Reed streets, in the district of Southwark, county of Philadelphia, at the distance of one hundred ninety-seven feet westward from the west side of said Seventh street, containing in front or breadth on the said State street eighty-four feet and extending of that width southward in length or depth between lines parallel to the said Seventh street on the east line thereof twenty-two feet three inches, and on the west line thereof eight feet three inches, more or less; bounded northward by the said State street, southward by ground formerly of Ann James, eastward by ground granted to Thomas H. Adams on ground rent, southward by other ground formerly of the late Alexander Osbourn, reserving thereout the yearly ground rent of seventy-two dollars ($72.00), payable
39 half yearly on the first days of April and October to him, the said Alexander Osbourn, his heirs and assigns, and the said Adam Iseminger in the said ground-rent deed duly covenanted to pay the said ground rent, as therein will more fully appear; and the said Alexander Osbourn, being so thereof seized, departed this life on or about the 1st day of May, 1859, having first made and published his last will and testament, in writing, bearing date the 6th day of May, 1854, and since his decease duly proved and registered at Philadelphia in Will Book No. 56, p. 44, etc., wherein and whereby he gave to his executors therein named the power to sell any or all of his real estate and give to the purchasers thereof good and sufficient acquittance in law, as by reference to said will and

the record thereof more fully and at large appears, and by said will the said Alexander Osbourn appointed Lewis G. Osbourn and Mahlon D. Livinsetter to be the executors thereof, which appointment they renounced, and Joseph A. Clay was duly appointed administrator thereof *cum testamento annexo*, and the said Joseph A. Clay, administrator as aforesaid, departed this life in the year 1881, whereupon the register of wills for the county of Philadelphia aforesaid, on the 30th day of April, 1892, appointed Harry G. Clay administrator *de bonis non cum testamento annexo*, all of which by reference to the records of said register of wills will more fully and at large appear.

40 And the said Harry G. Clay, administrator *de bonis non cum testamento annexo*, claims herein to recover arrears of the said ground rent as per the following—

Statement.

Six months' rent, under ground-rent deed between Alexander Osbourn and Adam Iseminger, dated and recorded as above stated, due April 1st, 1887	$36.00
Six months' ground rent, under same, due Oct. 1st, 1887	36.00
Ditto, due April 1st, 1888	36.00
" " Oct. 1st, 1888	36.00
" " April 1st, 1889	36.00
" " Oct. 1st, 1889	36.00
" " April 1st, 1890	36.00
" " Oct. 1st, 1890	36.00
" " April 1st, 1891	36.00
" " Oct. 1st, 1891	36.00
" " April 1st, 1892	36.00
" " Oct. 1st, 1892	36.00
" " April 1st, 1893	36.00
" " Oct. 1st, 1893	36.00
" " April 1st, 1894	36.00
" " Oct. 1st, 1894	36.00
" " April 1st, 1895	36.00
41	
" " Oct. 1st, 1895	36.00
" " April 1st, 1896	36.00
" " Oct. 1st, 1896	36.00

With interest on each arrear.

GEORGE HENDERSON,
Att'y for Pl'ff.

Endorsement: 240, Dec. T., 1896, C. P. 1. Harry G. Clay, administrator *d. b. n. c. t. a.* of Alexander Osbourn, deceased, *vs.* Adam Iseminger. Præcipe for alias summons. Filed Dec. 12, 1896. Hunter, pro proth'y. Henderson.

Summons.

COUNTY OF PHILADELPHIA, } ss:
The Commonwealth of Pennsylvania, }

[SEAL.] To the sheriff of the county of Philadelphia, Greeting:

We command you that you summon Adam Iseminger, late of your county, so that he be and appear before our judges, at Philadelphia, at our court of common pleas No. 1 of the county of Philadelphia, to be holden at Philadelphia, in and for said county, on the first Monday of December next, there to answer Harry G. Clay, administrator *de bonis non cum testamento annexo* of the estate of Alexander Osbourn, deceased, the said Harry G. Clay having been duly appointed by the register of wills on the 30th of April, 1892, in place of Joseph A. Clay, who was duly appointed administrator *cum testamento annexo* of said estate in place of Lewis G. Osbourn and Mahlon D. Livinsetter, who were the executors named in the last will
42 and testament of said Alexander Osbourn, and who renounced their right to act, of a plea of assumpsit sur-ground-rent deed between Alexander Osbourn and Jennie M., his wife, and Adam Iseminger, dated Jan. 4th, 1854, and recorded Jan. 4th, 1854, in the proper office, in Philadelphia, in Deed Book T. H. No. 127, page 80, &c.; and to have you then and there this writ.

Witness the Honorable Craig Biddle, president judge of our said court, at Philadelphia, the 28th day of November, in the year of our Lord one thousand eight hundred and ninety-six (1896).

J. U. G. HUNTER,
Pro Proth'y.

Endorsement: 240, Dec. term, 1896, court of C. P. No. 1. Harry G. Clay, adm'r, &c., *vs.* Adam Iseminger. N. H. Summons. Henderson. *Nihil habet.* So answers Sam'l M. Clement, sheriff.

HARRY G. CLAY, Adm., &c., } C. P. No. 1, Dec. Term, 1896. No. 240.
vs.
ADAM ISEMINGER. }

Proth'y will please enter my appearance for defendant in above-entitled case.

J. WILLIS MARTIN.

To proth'y, C. P.

Endorsement: 240, C. P. 1, Dec. T., 1896. Clay, adm'r, &c., *v.* Iseminger. Order for appearance. Filed Jan. 18, 1897. J. Briggs, pro proth'y. J. Willis Martin for def't.

43 HARRY G. CLAY, Adm'r, &c., *vs.* ADAM ISEMINGER. } C. P. No. 1, December Term, 1896. No. 240.

PHILADELPHIA COUNTY, *ss:*

Elmer H. Rogers, being duly sworn according to law, deposes and says that he has a just, full, and complete defence to the whole of the plaintiff's claim in the above case of the following nature and character:

Deponent is the terre-tenant and owner in fee of the lot of ground described in the ground-rent deed upon which this suit is brought, his title thereto being derived by various mesne conveyances from Adam Iseminger, the covenanter in said ground-rent deed and defendant in this case.

Deponent avers that no payment, claim, or demand has been made by any one on account of or for any ground rent on the premises for which suit is brought in this case or of or from any owner of said premises or any part thereof for more than twenty-one years prior to the bringing of this suit; that no declaration or acknowledgment of the existence thereof or of the right to collect said ground rent thereon has been made within that period by or for any owner of said premises or any part thereof, and that neither he or they or any of them within that period ever executed any
44 declaration of no set-off in reference to said ground rent, or recognized its existence in any way, manner, shape, or form.

All which facts he avers are true, and he expects to be able to prove them on the trial of the cause.

ELMER H. ROGERS.

Sworn to and subscribed before me this 27th day of January, A. D. 1897.

NEVIN J. LOOS,
M. C. C. of N. J.

Endorsement: 240, Dec., 1896. Clay, adm'r, *vs.* Iseminger. C. P. No. 1. Affidavit of defense. Filed Jan. 28, 1897. P. Hunter, pro proth'y. Simpson, Jr.

CLAY *v.* ISEMINGER. } C. P. No. 1, Dec. Term, 1896. No. 240.

And now, January 22nd, 1897, on motion of Alex. Simpson, Jr., att'y for Elmer E. Rogers, the present owner of the land out of which the ground rent sued for in this case purports to issue, a rule is granted upon plaintiffs to show cause why said Elmer E. Rogers should not have leave to intervene and defend *pro interesse suo*, all proceedings to stay meanwhile; returnable January 30, 1897.

F. A. BREGY.

Endorsement: 240, Dec., 1896. Clay *v.* Iseminger. C. P. No. 1. Rule for leave to intervene and defend, proceedings to stay. Filed Jan. 22, 1897. D. Simpson, Jr.

45 HARRY G. CLAY, Adm'r, &c., *vs.* ISEMINGER. } C. P. No. 1, December Term, 1896. No. 240.

Proth'y will please withdraw my appearance for Iseminger, defendant in the above-entitled case.

J. WILLIS MARTIN.

I hereby agree to the above.

GEORGE HENDERSON.

Endorsement: 240, Dec. T., 1896, C. P. 1. Clay *vs.* Iseminger. Order to withdraw appearance. Filed Jan. 30, 1897. P. Hunter, pro proth'y. Henderson.

CLAY, Administrator *d. b. n. c. t. a.*, *vs.* ISEMINGER, Defendant; ROGERS, Terre-tenant. } C. P. No. 1, Dec. T., 1896. No. 240.

And now, December 28th, 1897, on motion of George Henderson, Esq., attorney of plaintiff, rule on defendants to show cause why judgment should not be entered for want of a sufficient affidavit of defence; returnable Saturday, December 8th, 1898, at ten a. m.

The plaintiff assigns as the reason why the rule should be made absolute because:

46 1. So much of the act of 27th of April, 1855, and in so far as it impairs the contract reserving the rent, which was created before 27th of April, 1855, is unconstitutional because inhibited by the tenth section of article 1 of the Constitution of the United States, which provides:

"No State shall enter into any treaty, alliance or confederation; grant letters of mark and reprisal; coin money; emit bills of credit; make anything but gold and silver a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

GEORGE HENDERSON,
Attorney for Plaintiff.

To prothonotary C. P.

Endorsement: 240, Dec. term, 1896, C. P. 1. Clay, adm'r, &c., *v.* Iseminger. Rule on defendants to show cause why judgment should not be entered for want of a sufficient affidavit of defence. Filed Dec. 28, 1897. D. George Henderson.

CLAY *v.* ISEMINGER. } C. P. No. 1, Dec. Term, 1896. No. 240.

Be it remembered that the plaintiff in the December term, 1896, come into the said court and filed his statement in an action

47 of assumpsit sur-ground rent, to which the defendant filed an affidavit of defence.

And afterwards the plaintiff entered a rule on the defendant to

show cause why judgment should not be entered for the plaintiff for want of a sufficient affidavit of defence.

And on January 15th, 1898, the said court discharged the said rule for judgment.

And thereupon the counsel for the said Henry G. Clay, administrator, &c., did then and there except to the aforesaid decision discharging the said rule for judgment for want of a sufficient affidavit of defence, and inasmuch as the said exception does not appear on the record.

The said counsel for the said Henry G. Clay, administrator, &c., did then and there tender this bill of exception to the decision of the said court, and requested the seal of the judge should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exception this 21st day of January, 1898.

CRAIG BIDDLE,
P. J., C. P. 1. [SEAL.]

Endorsement: 240, Dec. term, 1896, C. P. 1. Clay *vs.* Iseminger & Rogers. Bill of exception. Filed Jan. 21, 1898. J. Kenderdine, pro proth'y. George Henderson.

48 CLAY, Adm. *d. b. n. c. t. a.*, *vs.* ISEMINGER. } C. P. No. 1, Dec. Term, 1896. No. 240.

And now, Jan. 21, 1898, we hereby certify that the value of the property and matter really in controversy in the above case is greater than $1,000, exclusive of costs.

CRAIG BIDDLE.

Endorsement: 240, Dec. term, 1896, C. P. 1. Clay *vs.* Iseminger. Certificate of amount in controversy. Filed Jan. 21, 1898. J. Kenderdine, pro proth'y. George Henderson.

EASTERN DISTRICT OF PENNSYLVANIA, *City and County of Philadelphia,* } *ss:*

[SEAL.] The Commonwealth of Pennsylvania to the justices of the court of common pleas No. 1 for the county of Philadelphia, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Harry G. Clay, administrator *de bonis non cum testamento annexo* of the estate of Alexander Osbourn, deceased, from the decree in No. 240, December term, 1896, wherein the said appellant was plaintiff and Adam Iseminger, defendant, and H. Rogers, terre-tenant, before you or some of you depending,

49 do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the first Monday of Feb-

ruary next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. S. GREENE,
Prothonotary.

Endorsement: 240, Dec. term, 1896, C. P. No. 1. No 63. January term, 1898, supreme court. Henry G. Clay, adm'r *d. b. n. c. t. a.*, appellant, *vs.* Adam Iseminger *et al.* Certiorari to the court of common pleas No. 1 for the county of Philadelphia. Returnable the first Monday of February, 1898. Rule on the appellee to appear and plead on the return day of the writ. Jan'y 28, 1898. Bro't into office. C. B. R. Filed Feb. 2, 1898, in supreme court. George Henderson, M. Hampton Todd.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania in and for the eastern district:

The record and process and all things touching the same so full and entire as before us they remain we certify and send as within we are commanded.

F. A. BREGY. [L. S.]

50 HARRY G. CLAY, Adm., etc., *vs.* ADAM ISEMINGER, Def't, and ELMER H. Rogers, Terre-tenant. } C. P. No. 1. Dec. Term, 1896. No. 240.

And now, Nov. 17th, 1898, the plaintiff, by George Henderson, Esq., his attorney, moves the court for a rule for a new trial, and in support of said motion files the following—

Reasons.

I. The verdict is against the law of the case.

II. The verdict is against the evidence of the case.

III. The learned trial judge erred in refusing plaintiff's offer of testimony to prove the non-payment of the ground-rent estate, which was as follows:

I offer to prove as a fact that this ground rent has never been paid off and extinguished. To do this I offer to prove that the late Alexander Osbourn was judicially declared to be a lunatic in April, 1856; that this ground rent was included in a schedule of assets belonging to the said lunatic, which schedule was annexed to a petition filed in the court of common pleas of Philadelphia county on October 16, 1858, by the committee of the said lunatic, in which

the said committee prayed leave to sell certain other real
51 estate belonging to the said lunatic; that the record of the said court of common pleas in the matter of the said lunatic's estate shows that no application was made to the said court for leave to sell or extinguish the said ground rent, and that no decree authorizing the sale or extinguishment of the said ground rent was ever made by the said court. I shall also offer in evidence the said record in the said proceedings in lunacy.

I will call Mr. Harry G. Clay, the administrator *d. b. n. c. t. a.* of the said Alexander Osbourn, and the plaintiff herein, to prove that Alexander Osbourn died insane in 1889, and that he, the said Harry G. Clay, is the executor of Joseph A. Clay, deceased, and who was the administrator *c. t. a.* of Alexander Osbourn, deceased, and who was one of the committee of the said lunatic during the whole period of said lunacy; that he, the said Harry G. Clay, was in the office and the assistant of the said Joseph A. Clay during the whole time that the latter occupied a fiducial relation to the said estate of Alexander Osbourn; that the said Osbourn by his will directed his executors to sell his realty, and appointed Mahlon D. Livensetter and Lewis G. Osbourn the executors thereof, both of whom renounced their said appointments; that the said Joseph A. Clay was then duly appointed administrator of the said estate; that since the death of the said Osbourn no one other than the said
Joseph A. Clay and the said Harry G. Clay has been invested
52 with authority to receive the said payment and give a release of the said ground rent; that the said Joseph A. Clay occupied a fiducial relation to many estates; that he was a careful and methodical man of business; that he kept accurate books of account of the said Osbourn estate during the whole of his stewardship, both as committee and as administrator; that he, the said Harry G. Clay, now has those books in his possession; that the said books contain no record of this ground rent having been paid; that to the best of the knowledge, information, and belief of the said Harry G. Clay the said ground rent has never been paid off, either during the lifetime of the said lunatic, or during the said administration of the said Joseph A. Clay, or during the said administration of the said Harry G. Clay.

I will also offer in evidence, as corroborating Mr. Clay's testimony and as tending to show the non-payment of this rent (estate), the account of Joseph A. Clay, committee of the lunatic aforesaid; the account of Joseph A. Clay, administrator *c. t. a.*, as aforesaid, as stated by his executor, Harry G. Clay, and the account of Harry G. Clay, administrator *d. b. n. c. t. a.*, as aforesaid.

I will then ask the jury to find as a fact from the foregoing evidence that the said ground-rent estate has not been extinguished by
being paid.

53 IV. The learned trial judge erred in instructing the jury as follows:

"As the law says that a ground rent not demanded within 21 years is irrecoverable, the verdict in this case must be for the defendant. The plaintiff is not entitled to recover because demand

was not made within twenty-one years. It is too old to make a claim of that kind."

V. The learned trial judge erred in declining plaintiff's first point, which was:

"First. That under the evidence in this case the verdict should be for the plaintiff."

VI. The learned trial judge erred in declining plaintiff's second point, which was:

"Second. That the seventh section of the act adopted by this Commonwealth on the 27th of April, 1855 (P. L. 368, sec. 7), which is as follows: 'That in all cases where no payment, claim or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground rent, annuity or charge a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable; provided, that the evidence of such payment
54 may be perpetuated by recording in the recorder of deeds office of the proper county the duplicate of any receipt therefor, proved by oath or affirmation, to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof shall be evidence until disproved, and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed; provided, that this section shall not go into effect until three years from the passage of this act,' is unconstitutional because it impairs the contract reserving this rent, being inhibited by the tenth section of article I of the Constitution of the United States, which is as follows:

'No State shall enter into any treaty, alliance or confederation; grant letters of mark and reprisal; coin money; emit bills of credit; make anything but gold and silver a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.'

I therefore charge you that under the evidence the verdict should be for the plaintiff."

55 VII. The learned trial judge erred in affirming defendant's point which was: "The verdict must be for the defendants."

GEORGE HENDERSON,
Att'y for Plaintiff.

11, 17, '98.

Endorsement: 240, Dec. T., 1896, C. P. 1. Clay, adm., etc., *vs.* Iseminger. Rule for new trial and reasons. Filed Nov. 17, 1898. D. George Henderson.

CLAY
vs.
ISEMINGER, Def't, & ROGERS, Terre-tenant. } C. P. No. 1, Dec. Term, 1896. No. 240.

To proth'y, C. P.:

And said terre-tenant pleads *nil debit* and payment.

SIMPSON & BROWN,
Attorneys for Terre-tenant.

10th month, 5th, 1898.

Endorsement: 240, Dec. term, 1896. Clay *vs.* Iseminger. C. P. No. 1. Pleas. Filed Oct. 5, 1898. P. White, pro proth'y. Simpson & Brown, attorneys for terre-tenant.

56 In the Court of Common Pleas No. 1, Philadelphia County, of December Term, 1896.

HARRY G. CLAY, Administrator *de bonis non cum testamento annexo* of the Estate of Alexander Osbourn, Deceased,
vs.
ADAM ISEMINGER, Defendant, and ELMER H. ROGERS, Terre-tenant. } No. 240.

Be it remembered that in the said term of December, 1896, came the said plaintiff into the said court and impleaded the said defendant in a certain plea of assumpsit, &c., in which the said plaintiff declared (*pro ut narr.*) and the said defendant pleaded (*pro ut pleas*); and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the county aforesaid, before the Honorable F. Amedee Bregy, judge of the said court, the fourteenth day of November, 1898, the aforesaid issue between the said parties came to be tried by a jury of the said county for that purpose duly empanelled (*pro ut* list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff, to
57 maintain the issue on his part, gave in evidence and offered to prove the matters and things hereinafter specifically set forth in the official stenographer's notes of the said trial, and the court instructed the jury as also set forth in said notes, viz:

HARRY G. CLAY, Adm'r, etc.,
vs.
ADAM ISEMINGER, Def't, and ELMER H. ROGERS, Terre-tenant.
} C. P. No. 1, D., '96. 240.

Before Bregy, J., November 14, 1898.

Present: G. Henderson, Esq., for pl't'ff; Alex. Simpson, Jr., Esq., for def'ts.

Index.

Plaintiff's Evidence.

Mr. Henderson offers in evidence statement of claim filed in the case and ground-rent deed.

Mr. HENDERSON: I offer to prove as a fact that this ground rent has never been paid off and extinguished. To do this I offer to prove that the late Alexander Osbourn was judicially declared
58 to be a lunatic in April, 1856; that this ground rent was included in a schedule of assets belonging to the said lunatic, which schedule was annexed to a petition filed in the court of common pleas of Philadelphia county on October 16, 1858, by the committee of the said lunatic, in which the said committee prayed leave to sell certain other real estate belonging to the said lunatic; that the record of the said court of common pleas in the matter of the said lunatic's estate shows that no application was made to the said court for leave to sell or extinguish the said ground rent, and that no decree authorizing the sale or extinguishment of the said ground rent was ever made by the said court. I shall also offer in evidence the said record in the said proceedings in lunacy.

I will call Mr. Harry G. Clay, the administrator *d. b. n. c. t. a.* of the said Alexander Osbourn and the plaintiff herein, to prove that Alexander Osbourn died insane in 1859, and that he, the said Harry G. Clay, is the executor of Joseph A. Clay, deceased, who was the administrator *c. t. a.* of Alexander Osbourn, deceased, and who was one of the committee of the said lunatic during the whole period of said lunacy; that he, the said Harry G. Clay, was in the office and the assistant of the said Joseph A. Clay during the whole time that the latter occupied a fiducial relation to the said estate of Alexander Osbourn; that the said Osbourn by his will directed his ex-
59 ecutors to sell his realty, and appointed Mahlon D. Livensetter and Lewis G. Osbourn the executors thereof, both of whom renounced their appointments; that the said Joseph A. Clay was then duly appointed administrator of the said estate; that since the death of the said Osbourn no one other than the said Joseph A. Clay and the said Harry G. Clay has been invested with authority to receive the said payment and give a release of the said ground rent; that the said Joseph A. Clay occupied a fiducial relation to many estates; that he was a careful and methodical man of business; that he kept accurate books of account of the said Osbourn estate during the whole of his stewardship both as committee and as administra-

tor; that he, the said Harry G. Clay, now has those books in his possession; that the said books contain no record of this ground rent having been paid; that, to the best of the knowledge, information, and belief of the said Harry G. Clay, the said ground rent has never been paid off either during the lifetime of the said lunatic or during the said administration of the said Joseph A. Clay or during the said administration of the said Harry G. Clay.

I will also offer in evidence as corroborating Mr. Clay's testimony and as tending to show the non-payment of this rent (estate) the account of Joseph A. Clay, committee of the lunatic aforesaid;

60 the account of Joseph A. Clay, administrator *c. t. a.*, as aforesaid, as stated by his executor. Harry G. Clay, and the account of Harry G. Clay, administrator *d. b. n. c. t. a.*, as aforesaid.

I will then ask the jury to find as a fact from the foregoing evidence that the said ground-rent estate has not been extinguished by being paid.

(Objected to as immaterial and irrelevant. Objection sustained. Exception to plaintiff.)

Plaintiff closes.

Defendant- offers no evidence.

Charge of the Court (Bregy, J).

GENTLEMEN: As the law says that a ground rent not demanded within 21 years is irrecoverable, the verdict in this case must be for the defendant-. The plaintiff is not entitled to recover because demand was not made within twenty-one years. It is too old to make a claim of that kind.

I decline the plaintiff's points.

(Exception to plaintiff to declination of plaintiff's points and affirmance of defendants' point.)

The following is a copy of plaintiff's points:

First. That under the evidence in this case the verdict should be for the plaintiff.

61 Second. That the seventh section of the act adopted by this Commonwealth on the 27th of April, 1855 (P. L. 368, sec. 7), which is as follows: "That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground rent annuity or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable; provided, that the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county the duplicate of any receipt therefor, proved by oath or affirmation, to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof shall be evidence until disproved; and the evidence of any such claim or demand may

be perpetuated by the record of any judgment recovered for such rent, annuity or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed; provided that this section shall not go into effect until three years from
62 the passage of this act," is unconstitutional because it impairs the contract reversing this rent, being inhibited by the tenth section of article I of the Constitution of the United States, which is as follows: "No State shall enter into any treaty, alliance or confederation, grant letters of mark and reprisal; coin money; emit bills of credit; make anything but gold and silver a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility." I therefore charge you that under the evidence the verdict should be for the plaintiff.

The following is a copy of defendants' point: "The verdict must be for the defendants."

(The court orders the charge of the court to be filed.) Verdict for defendants.

And counsel for the said plaintiff requested the court to charge the jury upon plaintiff's points as specifically set forth in the official stenographer's notes of the said trial, *supra;* which points were refused, and thereupon the counsel for the said plaintiff did then and there except to the said refusals to so charge.

And counsel for the said defendant- requested the court to charge the jury upon the defendants' point as specifically set forth in
63 the official stenographer's notes of the said trial, *supra*, and thereupon the court affirmed the said point of the defendant-; to which affirmance the plantiff then and there excepted.

And thereupon the court instructed the jury to find for the defendant-.

And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to and the overruling of plaintiff's offer of proof do not appear upon the record, the said counsel for the said plaintiff did then and there tender this bill of exceptions to the opinion of the said court and the rulings on the offers of proof as aforesaid and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 21st day of November, 1898.

F. A. BREGY. [SEAL.]

Endorsement: Court of common pleas No. 1, Philadelphia county, Dec. term, 1896. No. 240. Bill of exceptions. Harry G. Clay, adm., &c., *vs.* Adam Iseminger *et al.* Approved. Alex. Simpson, Jr., att'y for def't-. 11, 21, '98. Filed Dec. 7, 1898. Pennypacker, pro proth'y. George Henderson.

64 HARRY G. CLAY, Adm'r, etc., vs. ADAM ISEMINGER, Def't, and ELMER H. ROGERS, Terre-tenant. } C. P. No. 1, D., '96. 240.

Before Bregy, J., November 14, 1898.

Present: G. Henderson, Esq., for pl't'ff; Alex. Simpson, Jr., Esq., for def'ts.

Index.

Filed Dec. 5, 1898. D.

Plaintiff's Evidence.

Mr. Henderson offers in evidence statement of claim filed in the case and grount-rent deed.

Mr. HENDERSON: I offer to prove as a fact that this ground rent has never been paid off and extinguished. To do this I offer to prove that the late Alexander Osbourn was judicially declared to be a lunatic in April, 1856; that this ground rent was included in a schedule of assets belonging to the said lunatic, which schedule was annexed to a petition filed in the court of common pleas of Philadelphia county on October 16, 1858, by the committee of the said
65 lunatic, in which the said committee prayed leave to sell certain other real estate belonging to the said lunatic; that the record of the said court of common pleas in the matter of the said lunatic's estate shows that no application was made to the said court for leave to sell or extinguish the said ground rent, and that no decree authorizing the sale or extinguishment of the said ground rent was ever made by the said court. I shall also offer in evidence the said record in the said proceedings in lunacy.

I will call Mr. Harry G. Clay, the administrator *d. b. n. c. t. a.* of the said Alexander Osbourn, and the plaintiff herein, to prove that Alexander Osbourn died insane in 1859, and that he, the said Harry G. Clay, is the executor of Joseph A. Clay, deceased, who was the administrator *c. t. a.* of Alexander Osbourn, deceased, and who was one of the committee of the said lunatic during the whole period of said lunacy; that he, the said Harry G. Clay, was in the office and the assistant of the said Joseph A. Clay during the whole time that the latter occupied a fiducial relation to the said estate of Alexander Osbourn; that the said Osbourn by his will directed his executors to sell his realty, and appointed Mahlon D. Livensetter and Lewis G. Osbourn the executors thereof, both of whom renounced their said appointments; that the said Joseph A. Clay was then duly appointed administrator of the said estate; that
66 since the death of the said Osbourn no one other than the said Joseph A. Clay and the said Harry G. Clay has been invested with authority to receive the said payment and give a release of the said ground rent; that the said Joseph A. Clay occupied a

fiducial relation to many estates; that he was a careful and methodical man of business; that he kept accurate books of account of the said Osbourn estate during the whole of his stewardship, both as committee and as administrator; that he, the said Harry G. Clay, now has those books in his possession; that the said books contain no record of this ground rent having been paid; that to the best of the knowledge, information, and belief of the said Harry G. Clay the said ground rent has never been paid off either during the lifetime of the said lunatic or during the said administration of the said Joseph A. Clay or during the said administration of the said Harry G. Clay.

I will also offer in evidence as corroborating Mr. Clay's testimony and as tending to show the non-payment of this rent (estate) the account of Joseph A. Clay, committee of the lunatic aforesaid, the account of Joseph A. Clay, administrator *c. t. a.*, as aforesaid, as stated by his executor, Harry G. Clay, and the account of Harry G. Clay, administrator *d. b. n. c. t. a.*, as aforesaid.

I will then ask the jury to find as a fact from the foregoing
67 evidence that the said ground estate has not been extinguished by being paid.

(Objected to as immaterial and irrelevant. Objection sustained. Exception to plaintiff.)

Plaintiff closes.

Defendant- offers no evidence.

Charge of the Court (*Bregy, J.*).

GENTLEMEN: As the law says that a ground rent not demanded within 21 years is irrecoverable, the verdict in this case must be for the defendant. The plaintiff is not entitled to recover because demand was not made within twenty-one years. It is too old to make a claim of that kind.

I decline the plaintiff's points.

(Exception to plaintiff to declination of plaintiff's points and affirmance of defendants' point.)

The following is a copy of plaintiff's points:

First. That under the evidence in this case the verdict should be for the plaintiff.

Second. That the seventh section of the act adopted by this Commonwealth on the 27th of April, 1855 (P. L. 368, sec. 7), which is as follows: "That in all cases where no payment claim, or
68 demand shall have been made on account of or for any ground rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground rent, annuity or charge a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable; provided, that the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county the duplicate of any

receipt therefor, proved by oath or affirmation to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed; provided that this section shall not go into effect until three years from the passage of this act," is unconstitutional because it impairs the contract reserving this rent, being inhibited by the tenth section of article I of the Constitution of the United States, which is as
69 follows: "No State shall enter into any treaty, alliance or confederation; grant letters of mark and reprisal; coin money, emit bills of credit; make anything but gold and silver a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts or grant any title of nobility." I therefore charge you that under the evidence the verdict should be for the plaintiff.

The following is a copy of defendants' point: "The verdict must be for the defendants."

(The court orders the charge of the court to be filed.) Verdict for defendants.

I, the undersigned, official stenographer of the court of common pleas No. 1, room A, of Philadelphia county, hereby certify that the foregoing is a true, accurate, and faithful transcript of the stenographic notes of the testimony and judge's charge taken by me on the trial of the above-entitled cause.

W. A. SHAW.

Endorsement: No. 240, C. P. No. 1, —— term. —— *vs.* ——. Transcript of evidence and charge of the court.

70 HARRY G. CLAY, Adm'r, etc., } C. P. No. 1, Dec. T., 1896. No. 240.
vs.
ADAM ISEMINGER and ELMER H. ROGERS.

And now, November 21st, 1898, we hereby certify that the value of the property and matter really in controversy in the above case is greater than one thousand dollars, exclusive of costs.

F. A. BREGY.

Endorsement: 240. Dec. T., 1896. C. P. 1. Clay, adm'r, *v.* Iseminger. Certificate of amount in controversy. Filed Dec. 7, 1898. Pennypacker, pro proth'y. George Henderson.

Opinion of the Supreme Court of Pennsylvania. Filed July 21, 1898.

CLAY
v.
ISEMINGER. } January Term, 1898. No. 63. C. P. No. 1, Philadelphia County.

Argued 30 March, 1898.
Filed July 21, 1898.

Opinion by FELL, *J.:*

The action was to recover arrears of ground rent reserved
71 by deed dated January 4th, 1854. In the affidavit of defense it was averred that no payment, claim, or demand for the rent had been made by any one for more than twenty-one years, and that within that period of time no declaration or acknowledgment of the existence of the rent had been made by any one owning the premises. This brings the case directly within the provisions of the seventh section of the act of April 27th, 1855, P. L., 369, and the questions raised relate to the constitutionality of that section and to its application to ground rents reserved before its passage.

Both of these questions have been squarely presented and decided. The legislative intent to give the act a retroactive effect is apparent. In Korn *v.* Brown, 64 Pa., 55, which appears to be the first case in which the act was considered, it was decided that as the act did not go into effect for three years the retroactive bar was constitutional. In Biddle *v.* Hooven, 120 Pa., 221, the constitutionality of the act was the only question raised, and it was held that as the act merely operated to deprive the owner of the rent of a remedy for its collection after twenty-one years by raising a conclusive presumption of release or extinguishment, it was constitutional. In that case, as well as in the case of Wallace *v.* The Church, 152 Pa., 258, which decided that the act makes no exception in favor of persons under disabilities when their titles accrue, the ground rents were
72 created before the passage of the act of 1855. We must therefore consider the questions at rest.

The judgment is affirmed.

EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

[SEAL.] The Commonwealth of Pennsylvania to the justices of the common pleas court No. 1 for the county of Philadelphia, Greeting:

Whereas, by virtue of our writ of certiorari from our supreme court of Pennsylvania for the eastern district, returnable in the same court on the first Monday of February, in the year of our Lord one thousand eight hundred and ninety-eight, a record was brought into the same court upon appeal by Harry G. Clay, administrator *de bonis non cum testamento annexo* of the estate of Alexander Osbourn, deceased, from your judgment made in the matter of No. 240, December term, 1896, wherein the said appellant was plaintiff and

Adam Iseminger defendant and Elmer H. Rogers terre-tenant, and it was so proceeded in our said supreme court that the following decree was made, to wit:

The judgment is affirmed;

And the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas
73 No. 1 for the county of Philadelphia aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we here remit you the record of the decree aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 29th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. S. GREENE,
Prothonotary.

Endorsement: 240, Dec. term, 1896, C. P. No. 1. No. 63, January term, 1898, supreme court. In the matter of the appeal of Harry G. Clay, adm'r, etc., *vs.* Adam Iseminger *et al.* Remittitur. Att'y, 3. Filed July 29, 1898. C. P. M.

EASTERN DISTRICT OF PENNSYLVANIA, } *ss:*
City and County of Philadelphia, }

[SEAL.] The Commonwealth of Pennsylvania to the justices of the court of common pleas No. 1 for the county of Philadelphia, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Harry G. Clay, administrator *d. b. n. c. t. a.* of Alexander Osbourn, deceased, from the judgment in No. 240, December term, 1896, wherein the said appellant was plaintiff and Adam
74 Iseminger was defendant and Elmer H. Rogers, terre-tenant, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia in and for the eastern district the first Monday of February next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 20th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. S. GREENE,
Prothonotary.

Endorsement: 240, Dec. term, 1896, C. P. No. 1. No. 409, January term, 1898, supreme court. Harry G. Clay, adm'r *d. b. n. c. t. a.* of Alexander Osbourn, dec'd, appellant, *vs.* Adam Iseminger, def't, and Elmer H. Rogers, terre-tenant. Certiorari to the court of common pleas No. 1 for the county of Philadelphia. Returnable the first Monday of February, 1899. Rule on the appellee to appear and plead on the return day of the writ. Dec. 21, 1898. Brought into office. R. V. Clay, pro proth'y. Filed Jan. 7, 1899, in supreme court. George Henderson.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania in and for the eastern district:

The record and process and all things touching the same so full and entire as before us they remain we certify and send, as within we are commanded.

ABRAHAM M. BEITLER. [L. S.]
CRAIG BIDDLE. [L. S.]

75 *Opinion of the Supreme Court of Pennsylvania. Filed April* 3, 1899.

HARRY G. CLVY, Adm'r, Ap't, v. ADAM ISEMINGER. } C. P. No. 1 of Philadelphia Co. No. 409, January Term, 1898.

Filed April 3, 1899.

Per Curiam:

We are not convinced that the learned trial court erred in refusing to affirm plaintiff's first and second points or in directing a verdict in favor of the defendants. The first three specifications of error are therefore overruled.

There was no error in sustaining defendants' objections to the offers of evidence recited in the fourth and last specification.

When this case was here before on the plaintiff's appeal from the refusal of the court below to enter judgment for want of a sufficient affidavit of defense (187 Pa., 108) the principles involved were considered and decided. It is unnecessary to repeat what we said then nor to add anything thereto.

Judgment affirmed.

76 EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

[SEAL.] The Commonwealth of Pennsylvania to the justices of the common pleas court No. 1 for the county of Philadelphia, Greeting:

Whereas by virtue of our writ of certiorari from our supreme court of Pennsylvania for the eastern district, returnable in the same court on the first Monday of February, in the year of our Lord one thousand eight hundred and ninety-nine, a record was brought into the same court upon appeal by Harry G. Clay, administrator

d. b. n. c. t. a. of Alexander Osbourn, deceased, from your judgment made in the matter of No. 240, December term, 1896, wherein the said appellant was plaintiff and Adam Iseminger defendant and Elmer H. Rogers terre-tenant, and was so proceeded in our said supreme court that the following decree was made, to wit:

Judgment affirmed;

And the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas No. 1 for the county of Philadelphia aforesaid, as well for execution or otherwise as to justice shall appertain:

Wherefore we here remit you the record of the decree aforesaid and the proceedings thereupon, in order for execution or
77 otherwise, as aforesaid.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 5th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

CHAS. S. GREENE,
Prothonotary.

Endorsement: 240, Dec. term, 1896, C. P. No. 1. No. 409, January term, 1898, supreme court. In the matter of the appeal of Harry G. Clay, adm'r *d. b. n. c. t. a.* of Alexander Osbourn, deceased, *vs.* Adam Iseminger *et al.* Remittitur. Att'y, 3.00. Filed Apr. 6, 1899. R. V. Clay, pro proth'y.

EASTERN DISTRICT OF PENNSYLVANIA, } *ss:*
City and County of Philadelphia, }

[SEAL.] The Commonwealth of Pennsylvania to the justices of the court of common pleas No. 1 for the county of Philadelphia, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Harry G. Clay, administrator *d. b. n. c. t. a.* of Alexander Osbourn, deceased, from the judgment No. 240, December term, 1896, wherein the said appellant was plaintiff and Adam Iseminger defendant and Elmer H. Rogers terre-tenant, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before
78 the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, forthwith, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 23rd day of

October, in the year of our Lord one thousand eight hundred and ninety-nine.

CHAS. S. GREENE,
Prothonotary.

Endorsement: 240, Dec. term, 1896, C. P. No. 1. No. 409, January term, 1898, supreme court. Harry G. Clay, adm'r *d. b. n. c. t. a.* of Alexander Osbourn, deceased, appellant, *vs.* Adam Iseminger, def't; Elmer H. Rogers, terre-tenant. Certiorari to the court of common pleas No. 1 for the county of Philadelphia. Returnable forthwith. Rule on the appellee to appear and plead on the return day of the writ. Oct. 23, 1899, bro't into office. C. P. M. Filed Oct. 31, 1899, in supreme court. George Henderson.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

ABRAHAM M. BEITLER. [L. S.]
F. A. BREGY. [L. S.]

79 *Assignments of Error.*

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1898.

HARRY G. CLAY, Administrator, etc., Appellant,
vs.
ADAM ISEMINGER, Defendant, and ELMER H. ROGERS, Terre-tenant, Appellee.
} No. 409.

Assignments of error.

1. The court erred in answering plaintiff's first point, which was: "First. That under the evidence in this case the verdict should be for the plaintiff."

The court did not respond to the plaintiff's points separately, but as to both answered: "I decline the plaintiff's points."

2. The court erred in answering plaintiff's second point, which was:

"Second. That the seventh section of the act adopted by this Commonwealth on the 27th of April, 1855 (P. L. 368, sec. 7), — or demand shall have been made on account of or for any ground rent annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have
80 been made within that period by the owner of the premises, subject to such ground rent, annuity or charge a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable provided that the evidence of such payment may be perpetuated by recordi ng in

the recorder of deeds' office of the proper county the duplicate of any receipt therefor, proved by oath or affirmation, to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by his deponent, which recorded duplicate or the exemplification of the record thereof shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed; provided that this section shall not go into effect until three years from the passage of this act," is unconstitutional because it impairs the contract reserving this rent, being inhibited by the tenth section of article 1 of the Constitution of the United States, which is as follows:

'No State shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver a tender in pay-
81 ment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.'

I therefore charge you that under the evidence the verdict should be for the plaintiff."

The court did not respond to the plaintiff's points separately, but as to both answered: "I decline the plaintiff's points."

3. The court erred in instructing the jury as follows:

"As the law says that a ground rent not demanded within 21 years is irrecoverable, the verdict in this case must be for the defendant."

4. The court erred in answering the defendant's objection to the plaintiff's offer of testimony to prove the non-payment and non-extinguishment of the ground-rent estate, the deed reserving which and the due recording thereof being admitted, to wit:

"I offer to prove as a fact that this ground rent has never been paid off and extinguished. To do this, I offer to prove that the late Alexander Osbourn was judicially declared to be a lunatic in April, 1856; that this ground rent was included in a schedule of assets belonging to the said lunatic, which schedule was annexed to a petition filed in the court of common pleas of Philadelphia county on October 16, 1858, by the committee of the said lunatic, in
82 which the said committee prayed leave to sell certain other real estate belonging to the said lunatic; that the record of the said court of common pleas in the matter of the said lunatic's estate shows that no application was made to the said court for leave to sell or extinguish the said ground rent, and that no decree authorizing the sale or extinguishment of the said ground rent was ever made by the court. I shall also offer in evidence the said record in the said proceedings in lunacy.

I will call Mr. Harry G. Clay, the administrator *d. b. n. c. t. a.* of the said Alexander Osbourn, and the plaintiff herein, to prove that Alexander Osbourn died insane in 1859, and that he, the said Harry

G. Clay, is the executor of Joseph A. Clay, deceased, and who was the administrator *c. t. a.* of Alexander Osbourn, deceased, and who was one of the committee of the said lunatic during the whole period of his lunacy; that he, the said Harry G. Clay, was in the office and the assistant of the said Joseph A. Clay during the whole time that the latter occupied a fiducial relation to the said estate of Alexander Osbourn; that the said Osbourn by his will directed his executors to sell his realty and appointed Mahlon D. Livenstetter and Lewis G. Osbourn the executors thereof, both of whom renounced their said appointments; that the said Joseph A. Clay was then duly appointed administrator of the said estate; that since the death of the said Osbourn no one other than the said Joseph
83 A. Clay and the said Harry G. Clay has been invested with authority to receive the said payment and give a release of the said ground rent; that the said Joseph A. Clay occupied a fiducial relation to many estates; that he was a careful and methodical man of business; that he kept accurate books of account of the said Osbourn estate during the whole of his stewardship, both as committee and as administrator; that he, the said Harry G. Clay, now has those books in his possession; that the said books contain no record of this ground rent having been paid; that to the best of the knowledge, information, and belief of the said Harry G. Clay the said ground rent has never been paid off, either during the lifetime of the said lunatic or during the said administration of the said Joseph A. Clay or during the said administration of the said Harry G. Clay.

I will also offer in evidence as corroborating Mr. Clay's testimony and as tending to show the non-payment of this rent (estate) the account of Joseph A. Clay, committee of the lunatic aforesaid; the account of Joseph A. Clay, administrator *c. t. a.*, as aforesaid, as stated by his executor, Harry G. Clay, and the account of Harry G. Clay, administrator *d. b. n. c. t. a.*, as aforesaid.

I will then ask the jury to find as a fact from the foregoing evidence that the said ground-rent estate has not been extin-
84 guished by being paid;" which offer the defendant objected to as immaterial and irrelevant, and which objection the court sustained, the plaintiff excepting thereto.

GEORGE HENDERSON,
Attorney for Appellant.

Endorsement: 409, Jan. term, 1898. In the supreme court of Pennsylvania, eastern district. Clay, administrator, &c., *vs.* Iseminger. Assignments of error. Filed Feb. 4, 1899, in supreme court. George Henderson.

Substitution of Jeannie M. Wilson as Plaintiff in Error.

In the Supreme Court of Pennsylvania in and for the Eastern District, January Term, 1898.

HARRY G. CLAY, Administrator, &c.,
vs.
ADAM ISEMINGER and ELMER H. ROGERS. } No. 409.

And now, Oct. 23rd, 1899, Harry G. Clay having been discharged from his said office of administrator and Jeannie M. Wilson having been duly appointed to the said office, the substitution of the said Jeannie M. Wilson, administratrix *de bonis non cum testamento annexo*, as plaintiff in error, is hereby suggested in place of the said Harry G. Clay, administrator, etc., with the same effect as if the pro-
85 ceedings had originally been instituted by her.

GEORGE HENDERSON,
Attorney for Jeannie M. Wilson, Administrator d. b. n. c. t. a.

Endorsement: 409, January term, 1898. In the supreme court of Pennsylvania, eastern district. Clay *vs.* Iseminger. Substitution of Jeannie M. Wilson as plaintiff in error. Filed Oct. 23, 1899, in supreme court. George Henderson.

UNITED STATES OF AMERICA, } *ss:*
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record, pages 1 to 87, inclusive, is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending, wherein Harry G. Clay, adm'r *d. b. n. c. t. a.* of Alexander Osbourn, deceased, substituted by Jeannie M. Wilson, adm'x *d. b. n. c. t. a.*, was appellant and Adam Iseminger, defendant, and Elmer H. Rogers, terre-tenant, were appellees.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of (Clay *vs.*
86 Iseminger) Pennsylvania, eastern district, at Philadelphia, the 9th day of November, 1900, and in the one hundred and twenty-fifth year of the Independence of the United States.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

{ Ten-cent United States internal-revenue stamp, canceled 11, 9, 1900. C. S. G. }

87 I, J. Brewster McCollum, chief justice of the supreme court of Pennsylvania, do hereby certify that Charles S. Greene was at the time of signing the annexed attestation and now is prothonotary of the said supreme court of Pennsylvania in and for the eastern district, to whose acts as such full faith and credit are and ought to be given, and that the said attestation is in due form.

In witness whereof I have hereunto subscribed my name this 9th day of November, one thousand nine hundred.

J. BREWSTER McCOLLUM,
Chief Justice.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania in and for the eastern district, do certify that the Honorable J. Brewster McCollum, by whom the foregoing certificate was made and given, was at the time of making and giving the same and is now chief justice of the supreme court of Pennsylvania, to whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature thereto subscribed is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania in and for the eastern district, at Philadelphia, this 9th day of November, one thousand nine hundred.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

{ Ten-cent United States internal-revenue stamp, canceled 11, 9, 1900. C. S. G. }

88 [Endorsed:] In the Supreme Court of the United States. Jeannie M. Wilson, adm., &c., plaintiff in error, *v.* Adam Iseminger & Elmer H. Rogers, defendants in error. M. Hampton Todd, George Henderson.

Endorsed on cover: File No., 17,969. Pennsylvania supreme court. Term No., 193. Jeannie M. Wilson, administratrix *d. b. n. c. t. a.* of the estate of Alexander Osbourn, deceased, &c., plaintiff in error, *vs.* Adam Iseminger and Elmer H. Rogers. Filed November 15th, 1900.

No. 193. October Term, 1901.

Office Supreme Court
FILED
FEB 24 1902
JAMES H. MCKENNEY,
Clerk

Brf. of Henderson for Pl'ff in Error

IN THE

Supreme Court of the United States.

Filed Feb. 24, 1902.

Jeannie M. Wilson, Administratrix *d. b. n. c. t. a.* of the Estate of Alexander Osbourn, deceased, &c., Plaintiff in Error,

vs.

Adam Iseminger and Elmer H. Rogers.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

INDEX.

GEORGE HENDERSON.

IN THE SUPREME COURT OF THE UNITED STATES.

Jeannie M. Wilson, Administratrix, &c.,

vs.

Adam Iseminger and Elmer H. Rogers.

October Term, 1901.

No. 193.

STATEMENT OF THE CASE.

The action below was upon a covenant *sur* ground rent deed dated January 4th, 1854, for the semi-annual arrears of rent arising thereunder from 1887 to 1896, inclusive. The rent was reserved by Alexander Osbourn, the testator of the plaintiff in error, Adam Iseminger being the covemantor. Elmer H. Rogers, the *terre* tenant, was permitted to intervene and defend *pro interesse suo.*

Upon filing of the affidavit of defense the plaintiff took a rule for judgment, from the discharge of which an appeal was taken to the Supreme Court of Pennsylvania. The action of the lower court in declaring the Act of 27th April, 1855, constitutional, was sustained. (See opinion on page 36 of the transcript of the Record.)

The cause was then plead to issue, and tried before Brégy, J., and a jury. By agreement of counsel, the plaintiff's claim for arrears of rent was established by his offering in evidence the statement of claim filed in the cause and the ground rent deed sued upon. The record discloses that the trial judge was requested to rule that the application of the seventh section of the Act of 27th April, 1855, of the Pennsylvania Assembly to this ground rent was unconstitutional because such application would impair the contract in the deed reserving the rent, this being inhibited

by the tenth section of article I. of the Constitution of the United States. The request was declined and binding instructions given for the defendant, the court charging in full as follows:—

> "GENTLEMEN:—As the law says that a ground rent not demanded within twenty-one years is irrecoverable, the verdict in this case must be for the defendant. The plaintiff is not entitled to recover because demand was not made within twenty-one years. It is too old to make a claim of that kind.
>
> "I decline the plaintiff's points."

Judgment having been entered in favor of the defendant, the plaintiff again removed the cause to the Supreme Court of Pennsylvania. The judgment of the lower court was affirmed. (See opinion on page 28 of transcript of Record.)

Harry G. Clay, the former administrator, resigned his position and Jeannie M. Wilson was appointed in his place. She was duly substituted as party plaintiff and thereupon obtained a writ of error to this court.

The plaintiff contends that the Act of 27th April, 1855, of the Pennsylvania Assembly, under which her recovery is barred, impairs her contract because as to rents reserved before its passage it lays down a new rule of property. The said statute exceeds the legitimate scope of an Act of limitation in the retrospective application of the new rule of property.

SPECIFICATIONS OF ERROR.

I. The Supreme Court of Pennsylvania erred in not deciding that the Act of the Pennsylvania Assembly of 27th of April, 1855, section 7, lays down a new rule of property which retroactively applied to said ground rent reserved in 1854 impairs the obligation of the contract in the deed reserving the same.

II. The Supreme Court of Pennsylvania, in deciding that the Act of the Pennsylvania Assembly of 27th April, 1855, section 7, merely operates to deprive the owner of the ground rent estate of a remedy for its collection, erred because the estate in the rent never becomes due and collectable.

III. The Supreme Court of Pennsylvania erred in deciding that arrears of rent accruing less than two months before the issuing of the writ in this case could not be recovered because the Act of the Pennsylvania Assembly of 27th April, 1855, section 7, had taken away the remedy before the right of action had arisen.

IV. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas, No. 1, of Philadelphia County in this cause.

V. The Supreme Court of Pennsylvania erred in not reversing the judgment and awarding a *venire facias de novo* to the Court of Common Pleas, No. 1, of Philadelphia County in this cause.

VI. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 1 of Philadelphia County because the court declined the plaintiff's first point, which was:—

> "*First.*—That under the evidence in this case, the verdict should be for the plaintiff."

VII. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 1, of Philadelphia County, because that court declined the plaintiff's second point, which was:—

> "*Second.*—That the seventh section of the Act adopted by this Commonwealth on the 27th of April, 1855 (P. L., 368, section 7), which is as follows:—

> "'That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable: *Provided,* That the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county the duplicate of any receipt therefor, proved by oath or affirmation to be a true copy of that signed and delivered in the presence of the payer, and witnessed at the time by this deponent, which recorded duplicate, or the exemplification of the record thereof, shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity, or charge in any court of record, or the transcript herein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed: *Provided,* That this section shall not go into effect until three years from the passage of this Act,'

is unconstitutional, because it impairs the contract in the deed reserving this rent, being inhibited by the tenth section of article I. of the Constitution of the United States, which is as follows:—

> "'No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver a tender in payment of debts; pass any bill of attainder, *ex post-facto* law or *law impairing the obligation of contracts,* or grant any title of nobility.'"

VIII. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 1, of Philadelphia County, because that court charged as follows:—

> "As the law says that a ground rent not demanded within twenty-one years is irrecoverable, the verdict in this case must be for the defendant."

Some Salient Points in the Law of Ground Rents before the Act of 27th April, 1855, and the Change in Public Policy which took place about that time.

Pennsylvania having been granted to Penn under tenure of free and common socage as of the castle of Windsor, and it having been early decided that the statute *quia emptores* was not in force in that State, the Supreme Court determined, in Ingersoll *vs.* Sergeant, 1 Wharton, 336-352 (1836), that a ground rent was a rent service with the incidents of fealty and tenure. See, also, Bosler *vs.* Kuhn, 8 W. & S., 184 (1844). Attention is here directed to these two incidents, because that of fealty strengthens and dignifies the obligation which it is claimed has been impaired, and because the incident of tenure imports a relation between the ground-rent landlord and the owner subject to the rent, which cannot be constitutionally severed in the way attempted by the seventh section, Act of 27th April, 1855.

A ground rent is reserved, not created. Ingersoll *vs.* Sergeant, *supra*. It is an annual sum reserved from the fruits of the land, and not a gross sum secured or paid. Cadwalader on Ground Rents, section 101. The ground-rent landlord cannot demand the cash value of his estate; it never becomes due, and is not subject to foreclosure, like a mortgage. Juvenal *vs.* Jackson, 14 Pa., 523 (1850). Judge Hare said, in Hillerman *vs.* Ingersoll, 5 Phila. Reports, 143, 144 (1863):—

> "But with a ground rent * * * the purpose is not that the principal shall be paid, but that it

> shall remain until the tenant thinks fit to pay it; the landlord cannot call in his money, and must suffer it to stand until it is brought to his door. He is not guilty of laches, nor the tenant of a default, and there is consequently no room for the presumption which might arise if the one had failed to perform and the other had neglected to insist on performance."

Judge Hare was speaking simply of the estate, and not of the semi-annual installments of interest.

A ground rent is reserved by deed which is the act of both parties. The burden of the covenant made by the grantee in fee runs with the land to the assignee of the grantee. Dunbar *vs.* Jumper, 2 Yeates, 74 (1796); Cadwalader on Ground Rents, section 11. The annual payments spring into existence and become debts when demandable. Bosler *vs.* Kuhn, 8 W. & S., 183 (1844).

The obligation of the tenant in fee can be well stated in the language of Chief Justice Sharswood's lectures, page 220:—

> "That he will pay the rents and make the returns which he has engaged to do, and that he will defend the title which he has received; that he will not disclaim nor deny it, and neither yield up nor attorn to a stranger."

The tenant cannot deny the title of the landlord. Heckerman *vs.* Hummell, 19 Pa., 70 (1852); Louer *vs.* Hummell, 21 Pa., 454 (1853).

The covenant to pay the annual rent as it becomes due excuses demand by the ground-rent landlord. Cadwalader, section 308. The tenant may be penalized with interest for any delay in making tender. McQuesnay *vs.* Hiester, 33 Pa., 435 (1859).

In St. Mary's Church *vs.* Miles, 1 Wharton, 229 (1835), affirmed in McQuesnay *vs.* Hiester, *supra*, and in Lindsey *vs.* Lindeman, 69 Pa., 100 (1871), Mr. Justice Kennedy said:—

> " * * At common law mere lapse of time, without demand of payment, is not sufficient to raise a presumption that a ground rent has been released or otherwise extinguished. The lapse of twenty years without demand of payment is evidence from which a jury may presume payment of the arrears of the ground rent; but even this presumption may be repelled by circumstances."

See, also, Cadwalader, section 463.

Counsel for the defendant in error, in St. Mary's Church *vs.* Miles, *supra*, state (page 232) that it was common to suffer ground rents in Philadelphia to remain in arrear many years:—

> "Instances have occurred of the recovery of arrears for fifty years."

The relation of tenancy exists until severed by some unequivocal act. In Cadwalader *vs.* App., 81 Pa., 194-211 (1876), the case of a lease for ten thousand years, the Supreme Court said:—

> "When one has entered expressly or legally in subservience to the title of the owner, the statute (of limitation) does not begin to run in favor of such occupant until the privity between him and the owner is severed by some unequivocal act."

In all ground-rent deeds there is a covenant for the release of the estate by deed. (See deed in this case, transcript of record, page 18.) Mr. Justice Kennedy said, in St. Mary's Church *vs.* Miles (1835), *supra*, at page 235, that "a release without the execution of a deed, perhaps, never happened."

In order to afford a more complete remedy for ground-rent landlords the Act of 25th April, 1850, P. L., 569, section 8, was passed. It is still in force, and provides as follows:—

> "In all cases now pending, or hereafter to be brought in any court of record in this Common-

wealth, to enforce the payment of ground rent due and owing upon lands or tenements, held by virtue of any lease for life, or a term of years, or in fee, the lessor, his heirs and assigns, shall have a full and complete remedy therefor by action of covenant against the lessee or lessees, his, her, or their heirs, executors, administrators, or assigns, whether said premises out of which the rent issues be held by deed, poll, or otherwise."

Ground rents were early in great favor in Pennsylvania. (See Kennedy, J., in St. Mary's Church *vs.* Miles, *supra*, page 235.) E. P. Allinson, in his history of ground rents in Philadelphia (1888), (University of Pennsylvania Publications, No. 3), says they have been a potent influence in developing Philadelphia and in the creation of a multitude of small houses. It was early decided they could be apportioned. Although the conversion of real estate of minors is not favored, the Act of 16th March, 1847, section 2, P. L., 474, was passed empowering the Orphans' Court to decree the letting of lands of minors on ground rent; the Act of 23d January, 1847, protected them from discharge by sale under a municipal claim; section 1 of the Act of 7th March, 1853, P. L., 155, authorizes all building associations to sell lands on ground rents; the Act of 23d April, 1858, authorizes all insurance, trust companies, and saving funds to purchase, hold, sell, and convey ground rents; and the Act of 8th May, 1876, enables hospitals, schools, and charitable institutions to purchase, take, and hold them.

About 1850 there arose an antagonism to certain incidents to ground-rent estates. The Act of 22d April, 1850, P. L., 549, forbade the reservation of rents to become perpetual upon the breach of a condition in the deed; the Act of 24th June, 1885, P. L., 161, section 1, forbade the creation of irredeemable and non-extinguishable ground rents; the Act of 28th April, 1868, empowered a court of equity to extinguish ground rents presumed to be released under the Act of 27th April, 1855;

but in Haines' Appeal, 73 Pa., 169 (1873), Judge Sharswood declared the Act unconstitutional as an infringement of the right of trial by jury; the Act of 15th April, 1869, P. L., 47, provided for the compulsory extinguishment of irredeemable rents upon compensation by the tenant. This was also declared unconstitutional in Palairet's Appeal, 67 Pa., 479 (1871).

The seventh section of the Act of 27th April, 1855, was a part of this antagonistic legislation. A glance at its provisions will show that it is more than a mere act of limitation; it lays down new rules of property. It retroactively modifies the incidents of ground-rent estates in such a way as to impair the contract in the deed reserving the rent. Expediency or a change in public policy can never justify the disregard of fundamental constitutional principles. Mr. William D. Guthrie, in his volume on the Fourteenth Amendment, says, on page 40:—

> "Present inconvenience, however great, present expediency, however tempting, can never justify the slightest disregard of any provision of a constitution."
>
> Angle *vs.* Chicago, &c., Railway Co., 151 U. S., 1, 18.

The Act of 27th April, 1855, Section 7.

"That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable: *Provided*, That the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the

proper county the duplicate of any receipt therefor, proved by oath or affirmation to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity, or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed: *Provided*, That this section shall not go into effect until three years from the passage of this Act."

Interpretation of said Act by the Supreme Court of Pennsylvania.

Since the passage of this Act the Supreme Court of Pennsylvania has been uncertain as to the ground of decision upon which to rest its constitutionality. In Korn *vs.* Browne, 64 Pa., 55 (1870), it was said that the Act was one perfecting title to real estate after twenty-one years' adverse possession. In Haines' Appeal, 73 Pa., 169 (1873), the Act of 28th April, 1868, providing for the extinguishment of ground rents presumed to be extinguished under the Act of 27th April, 1855, was declared to be unconstitutional. Justice Sharswood tacitly conceded the error in the ground of decision in Korn *vs.* Browne, and at the close of his opinion he said:—

> "We assume in this judgment that the evidence brought the case in law entirely within the purview of the Act of 1855. Upon that, however, we give no opinion."

In Biddle *vs.* Hooven, 120 Pa., 221 (1888), the constitutionality of the Act was assailed by Richard M. Cadwalader, Esq., the author of the treatise on ground rents in Pennsylvania. It was seen that the Act could

not be sustained as one perfecting title after twenty-one years' adverse possession, because there could be no adverse possession without first severing ~~of~~ the tenancy. Mr. Justice Paxson, on page 227, concedes the error in the reasoning. He says that the Act merely operates to deprive the owner of a remedy after twenty-one years. And further, that—

> "The Act was not intended to destroy the ground landlord's ownership in the rent; it does not impair his title thereto, nor can it be said to impair the contract by which the rent was reserved, but from well-grounded reasons of public policy it declares that when the owner of such rent makes no claim or demand therefor for twenty-one years, it presumes it has been extinguished, which means nothing more than that it has been paid. * * *"

Let us examine this reasoning as applied to ground-rent estates, not arrears, in the light of three elementary principles:—

(*a.*) No remedy arises until the right of action accrues; (*b.*) the statute runs from the time the right of action accrues, and not from the date of the contract; and (*c.*) even though the remedy be taken away as to some arrears, the right in the estate remains inviolate. Campbell *vs.* Holt, 115 U. S., 625.

The remedies of the ground landlord are all with respect to the semi-annual installments of rent. As each becomes due a remedy arises. The right to collect each installment is independent of the others. The mere fact that some payments of an installment contract are barred cannot affect the right of recovery on those not matured. There is never a present right to sue for the ground-rent estate, *i. e.*, the principal sum invested; hence a statute cutting off the remedy has no relation to or effect upon the estate.

In Haines' Appeal, *supra*, it was decided that even after twenty-one years of non-payment, claim, or demand, the estate exists. In Biddle *vs.* Hooven, *supra*, it was said that the estate exists unimpaired. If it exists unimpaired,

then the sum of thirty-six dollars became due October 1st, 1896. The right of action as to this installment did not arise till then. This suit was brought within sixty days thereafter and we are told at the threshold our remedy is gone—actually taken away before the right accrued.

The fact that the seventh section of the Act of 1855 was not to become operative for three years after its passage has no bearing on the right of recovery of these arrears. They were not then due and did not mature till nearly thirty years later.

The reasoning in Korn *vs.* Browne was answered by the appellant in Biddle *vs.* Hooven, whereupon it was abandoned and a new basis adopted. This case is an attempt to answer the reasoning in Biddle *vs.* Hooven. It is dismissed with the remark that the question must be considered at rest.

ANALYSIS OF ARGUMENT.

The seventh section of the Act of 27th April, 1855, of the Pennsylvania Assembly, exceeds the legitimate scope of an Act of limitation in that it enacts a new rule of property which, retrospectively applied, impairs the obligation of the ground rent in question.

The argument will be developed under two general heads:—

I. The said Act exceeds the legitimate scope of an Act of limitation in that it enacts a new rule of property.

II. The retrospective application of this new rule of property impairs the obligation of this ground rent.

1. What is the obligation?
2. How is it impaired?

(*a.*) By depriving the owner of all remedy before the right of action arises.

(*b.*) By imposing a new condition of recovery.

(*c.*) By retrospectively applying a new rule of property.

I. THIS ACT EXCEEDS THE LEGITIMATE SCOPE OF AN ACT OF LIMITATION.

> "Cases may occur where the provisions of the law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for an interposition of the court."
>
> Jackson *vs.* Lamphire, 3 Peters, 280.

Acts of limitation are founded in public policy to quiet stale claims. They are sustained constitutionally upon the ground that claims should be promptly enforced, and to that end only a reasonable time after maturity must be allowed in which suit may be brought. If the limitative act concerns real estate it begins to run from some act inconsistent with ownership from which the law presumes an intention to abandon.

In the case of contracts the time limited does not run from the date thereof, but from the day of maturity. Until that day there is no right of enforcement and no default. If the contract be an installment one the limitation runs as to each installment from the day it falls due. Some installments may be barred by the statute, but that cannot affect the contract *quâ* the other installments. As to them there has been no day of maturity and no right to enforce payment, and hence no time from which the statute can begin to run.

By analogy the application of these principles is even more imperative in the case of ground rents. No portion of the principal sum invested in the estate in the rent ever matures. The semi-annual installments constitute the payment for the ground. As each payment falls due a right of action arises. If the remedy upon an installment contract cannot be taken away, *quâ* installments not matured, *a fortiori* is this true with ground rents.

The owner of a ground rent has a permanent investment so far as he alone is concerned. It is payable in semi-annual installments forever. The ground-rent landlord has no right to tender a deed of extinguishment and

demand the principal sum representing his rent. As to the estate in the rent there is no day of maturity, no day in court, no day of default, and hence no time from which a statute, *quâ* the estate, may begin to run. To presume the extinguishment of a contract because some installments are barred while others have not yet matured would be in excess of limitative principles.

The provisions of this Act are ineffectual to bar the estate in the rent. The seventh section provides that after twenty-one years of non-payment, claim, or demand there shall be a presumption of extinguishment, unless there has been a declaration or acknowledgment of the existence of the rent. Not one of the *criteria* established—non-payment, claim, or demand—has any reference to the estate in the rent, there being no right to claim or demand the principal sum invested; they simply refer to arrears of rent. It being beyond the power of the owner of the rent to demand payment on account of the estate therein, it necessarily follows that he cannot be deprived of his estate for failing to comply with an impossibility.

It is further provided that a declaration or acknowledgment shall rebut the presumption of extinguishment. In this way by the grace of the *terre*-tenant an extinguishment might be averted. But the execution of such a declaration or acknowledgment is not as of right. It scarcely needs argument to show that the enjoyment of property cannot be made dependent upon the whim of another. In Yick Wo *vs.* Hopkins, 118 U. S., 356, Mr. Justice Matthews said:—

> "The very idea that one man may be compelled to hold his life or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails as being of the essence of slavery itself."

By intendment, it may be argued, it is the purpose of this act to quiet the title to realty and not only to act on the remedy, but also on the estate iself. The time

limited in such a statute must be based on some act of the owner of the realty inconsistent with his rights as owner from which the law will presume an abandonment. It will be observed that this is the very minimum of requirement for such an Act. Nothing short of this will suffice. From a glance at the Acts of Limitation in force in the various States, most of which can be found in the appendix to "Angell on Limitations," it will be seen that a large number go further and require adverse possession as a basis. In this case a tenancy subsists. Heckerman *vs.* Hummel, 19 Pa., 64. There is no allegation of its severance.

Chief Justice Marshall says that it has not only been recognized in the courts of England, but in all others where the rules established in those courts have been adopted, that a possession which was permissive and entirely consistent with the title of another should not bar that title, and that it would shock the sense of right, which must be felt by all legislators and all judges, were it otherwise.

Kirk *vs.* Smith, 9 Wheat. (U. S.), 241, 288.

In Moore *vs.* State, 43 N. J. Law, 210, it is said:—

> "It is asserted that it is not within the appropriate sphere of legislation to take away vested rights of property without the fault or neglect of their owner; that government exists to guard such rights, not to destroy them, so far as this is true, is axiomatic; no advocate of free institutions will deny it; none can prove it."

Could a limitative act be based on anything but the fault or neglect of the owner, an act might be passed declaring that after twenty-one years of payment the *terre*-tenant shall be presumed to have received a release of the rent. Argument is unnecessary to demonstrate the invalidity of such an act, and yet it is closely analogous to that under discussion.

The question arises, do twenty-one years of non-pay-

ment, claim, and demand constitute evidence of abandonment upon which an act of limitation may be based? Fortunately for the appellant, this question is not an open one, it having been decided in the negative. In St. Mary's Church *vs.* Miles, 1 Wharton, 233 (1835), Mr. Justice Kennedy said:—

> "* * * The first is that upwards of thirty years having elapsed, without any demand having been made of the rent, or payment thereof received, a release of the right to demand it ought to be presumed. * * * Although it may be that the law will, in some cases, presume a grant in support of a right which has been exercised and enjoyed by a person, without objection or interruption, to the exclusion of all others, for a period of twenty years or more, yet it does not follow it ought to make such a presumption in order to defeat a person of a right created by a deed not controverted; without anything shown to have taken place in the conduct of the parties interested or concerned in the right that was inconsistent with the existence of it. * * * Nor was there ever any refusal on the part of the defendants * * * to pay it. * * * Until then nothing that was obviously incompatible with his right seems to have taken place. * * *"

This case was vigorously affirmed in 1859 in McQuesnay *vs.* Heister, 33 Pa., 439, and was cited approvingly in 1871 by Justice Sharswood in Lindsey *vs.* Lindeman, 69 Pa., 100.

Twenty-one years of non-payment, claim, and demand not being evidence of an intention to abandon the estate, can the legislature by an act decree otherwise? Recalling that we are discussing merely the retrospective feature of this act, there can be no question that the legislature cannot change the incidents of property so as to affect vested rights. This court has passed on the effect of such evidence and the legislature cannot modify that decision.

Indeed, in a *dictum* in St. Mary's Church *vs.* Miles, *supra*, Mr. Justice Kennedy said, foreshadowing the unconstitutionality of this act:—

> "We have no statute barring the right of an owner to an estate consisting of ground rent, through his neglect to assert it, nor yet to preclude him from recovering the rent itself, after any lapse of time, * * * The exercise of such a power would not only seem to be intrenching upon the legislative province, *but upon the constitutional right of the plaintiff*, by depriving him of his estate, without having given him any previous warning of his danger, so as to enable him to guard against it."

Having shown that this act exceeds the legitimate scope of a limitative act, in denying a remedy as to installments before they have matured, and in divesting title to the estate without some fault or neglect of the owner, it yet remains to be shown that thereby the obligation of the rent is impaired.

II. THE OBLIGATION OF THE RENT IS THEREBY IMPAIRED.

1. *What is the obligation of the rent?*

The nature of the obligation of a contract or grant is so clearly set forth in the cases we below cite that we shall not do more than allude to it.

The law which binds the covenantor to the performance of his promise is the law in force at the execution of the deed and which entered into and formed part of it. This is its obligation. Any subsequent act which diminishes the duty, obstructs the recovery, or by new rules of property imposes additional burdens on the covenantee, impairs the obligation.

In McCracken *vs.* Hayward, 2 How., 612, it appears that after the plaintiff had entered a judgment, the Legislature of Illinois passed an act providing that no property should

be sold by the sheriff for less than two-thirds of its value. In declaring the act unconstitutional, this court said:—

> "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * *
>
> "If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In Ogden *vs.* Saunders, 12 Wheat., 302, this court again said:—

> "The obligation of the contract consists in the power and efficacy of the law which applies to, and enforces performance of, the contract, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the Constitution uses the term 'obligation'"

In Menges *vs.* Dentler, 33 Pa., 498, it was said:—

> "The law which gives character to a case, and by which it is to be decided (excluding the forms of coming to a decision), is the law that is inherent in the case, and constitutes part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied, and the due course of law violated.
>
> "* * * My case cannot be decided by due course

of law, apart from the particular law, statutory or customary, that constitutes part of it and gives it class and character. In the very nature of things a law that is enacted after the case has arisen can be no part of the case. Such a law can have only a forced and unnatural relation to the case, and must produce an untrue decision; a decision, not of the case arising between the parties, as it ought to be, but of a case partly created by the legislature."

And in Long's Appeal, 87 Pa., 119:—

> "Every contract when entered into is made in view of the law then existing for the enforcement of contracts, and so the law becomes part thereof. Ogden *vs.* Saunders, 12 Wheat., 259."

Under the law as it stood before the Act of 27th April, 1855, was passed, the ground-rent landlord, his heirs and assigns, were entitled to a "full and complete remedy" in covenant. Section 8, Act of 25th April, 1850, Pepper & Lewis' Digest, 2225:—

> "*Action of Covenant for Ground Rent Extended.*—In all cases now pending, or hereafter to be brought in any court of record in this Commonwealth, to enforce the payment of ground rent due and owing upon lands or tenements, held by virtue of any lease for life, or a term of years, or in fee, the lessor, his heirs and assigns, shall have a full and complete remedy therefor by action of covenant against lessee or lessees, his, her, or their heirs, executors, administrators, or assigns, whether the said premises out of which the rent issues be held by deed, poll, or otherwise."

He could recover on the strength of his deed without proving a payment, claim, or demand within twenty-one years. Evidence of non-payment, claim, or demand for twenty-one years did not raise even a rebuttible presumption of the extinguishment of the estate. These principles of law were written into this rent, and in their vigor it is the constitutional right of the plaintiff to have them enforced.

2. *How is the obligation of the rent impaired?*

We shall endeavor to show that the obligation of this rent is impaired (*a*) by depriving the owner of all remedy as to these arrears before a right of action has accrued; (*b*) by imposing a new condition of recovery; and (*c*) by retroactively applying a new rule of property.

(*a.*) By depriving the owner of all remedy as to these arrears before a right of action has accrued.

The earliest arrears of rent involved in this suit accrued April 1st, 1887. As to them there is not even a presumption of extinguishment. It needs no argument to enforce the principle that the deprivation of the remedy before a right of action works an impairment of the contract. We shall content ourselves by citing a few of the leading cases.

Sturges *vs.* Crowninshield, 4 Wheat., 122, was an action for a debt in which a discharge under the New York Bankruptcy Act of 1811 was pleaded as a defense.

In holding that this Act could not be set up as a defense because it would impair the contract, Mr. Chief Justice Marshall, in delivering the opinion of the court, said (page 197):—

> "What is the obligation of a contract? And what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable of misconstruction than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it. * * *"

In Von Hoffman *vs.* Quincy, 4 Wall., 535, it appears that the Legislature of Illinois had authorized the city of Quincy to issue bonds and to levy a special tax to pay the interest thereon, and subsequently materially diminished this power of taxation after the bonds had been issued. It was held that the statute diminishing the remedy by restricting the power of taxation was unconstitutional so far as it affected the bonds. Mr. Justice Story said:—

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. *The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion.* The obligation of a contract 'is the law which binds the parties to perform their agreement.' Sturges *vs.* Crowninshield, 12 Wheaton, 257.
>
> "'One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force.' Planters' Bank *vs.* Sharp, 6 How., 227.
>
> "'A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the Constitution a shadow and a delusion.'"

> "A grant is within the protection of the clause forbidding the impairment of contracts. Fletcher *vs.* Peck, 6 Cranch., 87; 1 Hare's Am. Const. Law, 585.

No longer is the ground-rent deed *prima facie* evidence of the right. Under this Act and the authority

of Korn vs. Browne, 64 Pa., 55, the ground-rent landlord, to entitle him to recover, must also prove a payment, claim, or demand within twenty-one years. Even the remedy cannot be regulated by thus imposing a new condition upon the right of recovery, because it is not the law of the contract. It should be noted that more remedial statutes have been declared unconstitutional upon this ground than upon any other. The authorities are argumentatively convincing.

Judge Cooley, in his Constitutional Limitations, says, page 348:—

> "If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

And on page 354:—

> "And where a statute does not leave a party a substantial remedy according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper, or embarrass the proceedings to enforce the remedy, so as to destroy it entirely, and thus impair the contact so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, but is void because a substantial denial of right."

And again on page 358:—

> "In each of these cases it is evident that substantial rights were affected; and so far as the laws which were held void operated upon the remedy, they either had an effect equivalent to importing some new stipulation into the contract, or they failed to leave the party a substantial remedy such as was

assured to him by the law in force when the contract was made."

Judge Hare, in his Constitutional Law, says, page 687:—

"A statute varying a grant or charter, or taking away any right which it confers, cannot be defended on the ground that the infringement is slight and does not injuriously affect the contract. The question in such cases is not one of degree, but whether the obligation is so varied as to alter the relations of the parties, or preclude a right that might have been enforced but for the change. A covenantee is entitled to the very thing for which he stipulated, and the legislature cannot substitute a different thing, although of greater value."

In Green *vs.* Biddle, 8 Wheaton, 1, Mr. Justice Washington, in delivering the opinion of the court, said:—

"* * * If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure according to the nature and extent of such restrictions. * * *

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend on the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation. * * *"

Bronson *vs.* Kinzie, 1 Howard, 311, was a suit on a mortgage. It appeared that the Legislature of Illinois passed an Act which provided that mortgagors should have the right to redeem mortgaged premises at any time within twelve months from the day of the sale. It

was declared that this Act impaired the obligation of antecedent mortgages.

Mr. Chief Justice Taney, in delivering the opinion of the court, said:—

> "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. * * * Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. * * *
>
> "We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligations of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing, and no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it. * * *
>
> "When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such at least, has been brought to the notice of the court; and it must, therefore, be governed, and the right of the parties under it measured, by the rules

above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy; for, by the laws of the State then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law impairing the rights thus acquired impairs the obligations which the contract imposed. * * *

"It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. * * *

"Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgments and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States, as well as in those of the State."

See also—

McGahey *vs.* Virginia, 135 U. S., 662.

In Ohio Life Insurance Co. *vs.* Debolt, 16 How., 416, 431, it appeared that the plaintiff company had power under its charter to issue small bills. In order to compel the surrender of this power, the legislature laid a tax of twenty per cent. upon such corporations unless they would surrender this power, and then they were to be taxed but five per cent.

Mr. Chief Justice Taney declared the act unconstitutional, and suggested:—

> "Is a rule precluding a recovery on an antecedent contract, unless some act, not required by its terms be done, constitutional?"

C. By retroactively applying a new rule of property.

(*a.*) The old rule.

Before 1855 twenty-one years of non-payment, claim, or demand did not raise any presumption *quâ* the estate. Whereas now there is raised not only a presumption, but a conclusive presumption, and this, not from evidence, but from the mere fact that the estate has been reserved more than twenty-one years. Korn *vs.* Browne, 64 Pa., 55.

The state of the law previous to the passage of this act is so clearly set out in St. Mary's Church *vs.* Miles, *supra*, that we shall quote liberally from that opinion:—

> "* * * The first is that upwards of thirty years having elapsed, without any demand having been made of the rent, or payment thereof received, a release of the right to demand it ought to be presumed. * * * In regard to the first objection: although it may be that the law will, in some cases, presume a grant in support of a right which has been exercised and enjoyed by a person, without objection or interruption, to the exclusion of all others, for a period of twenty years or more, yet it does not follow that it ought to make such a presumption, in order to defeat a person of a right created

by a deed and not controverted; without anything shown to have taken place in the conduct of the parties intrusted or concerned in the right, that was inconsistent with the existence of it. In this case, from 1798, the time when the defendants first became the owners of the lot, out of which the plaintiff claims the ground rent, it does not appear that any demand was made of the rent until 1829, shortly before the commencement of this action; nor that there ever was any refusal on the part of the defendants, until then, to pay it, so that the plaintiff, had he claimed the rent by virtue of a bare previous seisin thereof, could not before that be said to have been disseized of it. Until then, nothing that was obviously incompatible with his right seems to have taken place. After this, he delayed no time in asserting his right by instituting this action for the recovery of it. But the rent claimed by the plaintiff being founded upon a reservation contained in a deed, whether he was ever seized of it or not, can in nowise affect his right to a recovery thereof. The evidence of his right to it does not depend upon his having been seized of it, but upon the deed, which is established beyond all question, and the tenor and effect whereof are too plain to be mistaken. This doctrine is fully established in Sir William Foster's case, 8 Co., 129, where it was held that a want of seisin within forty years, in the party, or those under whom he claimed a rent, as in the present case, was no bar or objection under the provisions of 32 Hen., 8, C. 2, to his distraining for it, because the party's right to the rent was evidenced by the reservation in the deed; and it was only where he was compelled, for want of such deed, to resort to evidence showing a seisin of the rent in order to establish his right to it, that this statute barred the claim, unless a seisin were proved to have existed within forty years. We have no statute barring the right of an owner to an estate consisting of ground rent, through his

neglect to assert it, nor yet to preclude him from recovering the rent itself, after any lapse of time. * * * The exercise of such a power would not only seem to be intrenching upon the legislative province, but upon the constitutional right of the plaintiff, by depriving him of his estate, without having given him any previous warning of his danger, so as to enable him to guard against it. It is proper here to bear in mind that it is the *title* or right of the plaintiff to the rent, as his freehold estate, that we are considering, and not his right to receive and enforce the payment of the back rents, which are the fruits of it, and which he alleges to be done and unpaid; because the rent, after it has become payable, is a mere debt or chose in action, which, from lapse of time, a jury might presume had been paid, in the absense of everything tending to show the contrary; but still the existence of the estate is *not* affected by such a presumption, nor the right of the owner thereof to demand and recover the subsequent accruing rents. It is of the very essence of the estate here that it should continue to exist according to its original limitation, continued in the reservation creating it; and accordingly it must endure forever, unless destroyed or put an end to by some positive act of the party having the power to do so, or by act or operation of law. But why should the neglect of the owner of the rent to demand it, after it has become payable for any given length of time, produce the same effect. Such neglect cannot in the least interfere with the rights of the owner of the lot, nor prejudice him in any way. He has a right to use and to improve the lot if he pleases; and this is all perfectly consistent with the duty that he owes to the owner of the ground rent. Their respective estates are distinct and susceptible of being fully enjoyed without conflict. Ground rents seem to have been created in this State with a view to promote the improvement of unimproved lands

by affording the grantees thereof the opportunity of employing their money in putting up dwelling and other houses thereon instead of giving it to the grantors in payment of what would have been considered a fair price for the purchase of the fee simple in the land, without any reservation of rent. The rent reserved in such cases forms the only and whole consideration that is to be paid for the land; and the grantee is bound to pay it only as long as the title which he receives from the grantor proves sufficient to protect and secure him in the enjoyment of the land granted. Hence, the right of the owner to the ground rent seems to be founded in great equity as well as justice, and ought not, therefore, to be regarded with any disfavor. Such a thing as the extinguishment of a ground rent by the owner thereof has seldom, perhaps never, happened without his executing a deed or instrument of writing to that effect, which may be placed on record, and the owner of the ground be thus protected forever after against the payment of the rent. There would seem, therefore, to be little reason for presuming a release of the ground rent merely from the delay of the owner in demanding it. Such presumption, if it were to be made, would doubtless be contrary to the truth of the fact in every case, and would certainly work injustice to the owner of the ground rent. As long, therefore, as the ground rent can be shown to have been created by a valid deed, and the title thereto clearly be established in the party claiming it, mere lapse of time ought not to be considered sufficient to raise the presumption that it has been released. * * *"

(*b.*) **The new rule.**

Since the adoption of the act of 1855 all ground-rent estates over twenty-one years old are presumed to be extinguished. This presumption can only be rebutted by showing a payment, claim, or demand within twenty-one years. Korn *vs.* Browne, 64 Pa., 55.

The act, furthermore, after twenty-one years of non-payment, claim, and demand, raises an irrebuttible presumption of extinguishment. What before was evidence of nothing inconsistent *quâ* the estate, has been made not *prima facie*, but conclusive, evidence of extinguishment. The retroactive application of this new rule sweeps away the estate in the rent and impairs its obligation.

The authorities forbidding the retroactive application of new rules of property are subjoined. Cooley, in his Constitutional Limitations, says, page 112:—

> "But to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law, a 'rule of civil conduct,' because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

In Norman *vs.* Heist, 5 W. & S., 173, Chief Justice Gibson said:—

> "* * * No citizen shall be deprived of his life, liberty, or property unless by the judgment of his peers or the law of the land. What law? Undoubtedly a pre-existent rule of conduct. * * *"

The language of the court in Cornell *vs.* Hichens, 11 Wis., 353, is directly applicable to this case:—

> "* * * The legislature cannot interfere with or impair the obligations of past contracts by declaring that, as against persons not previously affected by them, certain facts, if set up in the pleadings and established in evidence, shall be a defense, and operated to defeat actions brought to enforce them. It seems a hidden way of attempting to accomplish indirectly that which it was felt could not be done directly. The blow might better have been aimed directly at the contracts themselves; for the legislature might

> with equal propriety have declared that they should not be evidence in any court of justice, or that all courts of the State should hold the makers discharged from them."

In Olcott *vs.* Supervisors, 83 U. S., 690, it appeared that in 1879 the defendants issued certain bonds to aid in the construction of a railroad. The Supreme Court of ~~Michigan~~ had declared a railroad to be a public purpose, in aid of which bonds could be issued. In 1870 an action was brought upon certain bonds of the county of Fond du Lac issued in aid of a railroad. An appeal was taken to the Supreme Court of Wisconsin, which now reversed its former decision and declared that a railroad was not a public purpose.

The case was then removed to this court which reversed the Wisconsin judgment, Justice Strong saying:—

> "This court has always ruled that if a contract when made was valid under the Constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If then, the doctrine asserted in Whiting *vs.* Fond du Lac Co. is inconsistent with what was the recognized law of the State when the county orders were issued, we are under no obligation to accept it and apply it to this case."

From such evidence as the Act of 1855 provides, or, to speak more accurately, from no evidence at all, since the burden of proof is upon the owner of the rent, no jury would be allowed to find such facts, no court would draw such inferences. Is it possible that the legislature can do so? It needs no argument to show that inher-

ently there are some things without the power of the legislature. In the matter of the petition of the American Banking and Trust Co., 37 W. N. C. (Penna)., 297, 300, Judge Penrose said:—

> "There are some things, however, beyond the power of the legislature, even irrespective of constitutional restrictions. It cannot change the laws of nature, the properties of numbers, or the meaning of words. It cannot modify an axiom. Water will not boil at one hundred and ten degrees, nor freeze at fifty-two degrees; twelve times twelve will always be one hundred and forty-four; insufficient cannot be made the equivalent of sufficient, bad the equivalent of good; and things which are not equal to the same thing will not, in spite of the most solemn enactment to the contrary, be equal to each other."

In conclusion, the plaintiff in error suggests that her wrongs can be righted without any real disturbance of titles which should be protected. The legislature meets next January, when a proper act can be adopted limiting actions *sur* ground rents reserved before 1855.

GEORGE HENDERSON,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Jeannie M. Wilson, Administratrix, &c.,

vs.

Adam Iseminger and Elmer H. Rogers.

October Term, 1901.

No. 193.

REPLY OF PLAINTIFF IN ERROR.

The defendant's brief skillfully evades the argument and vigorously contends for irrelevant principles which are not denied. It is admitted that arrears of rent for more than twenty-one years prior to 1855 could be barred unless suit was brought within three years. The defendant contends that because plaintiff has not proven a demand or payment of interest for a period of twenty-one years elapsing since 1855, that thereby the principal of the estate, which could not be demanded, can be divested. He cites no authority for this remarkable proposition. He brushes aside, without a suggestion, the tenancy which exists between the plaintiff and defendant. No reason is given for divesting this estate when the plaintiff is legally in possession thereof.

The vice of the Act of 1855 consists in the adoption of a new rule of property which conclusively presumes a release of the estate. The mere fact that a period of time is allowed before the Act becomes effective, cannot validate it. New rules of property cannot be thus imposed. Especially is this true when we have a tenancy subsisting and no right to demand the principal sum invested.

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of the State of New York for the purpose of extirpating the Van Rensselaer and other rents. The bill was referred to a committee of which Samuel J. Tilden was chairman. He wrote an able and elaborate report conclusively showing its unconstitutionality. (See report, dated March 28th, 1846, Assembly Documents No. 156, State of New York.) In criticising the Act he used language closely applicable to this case:—

> "It denies the remedy altogether, except on a condition which has no relation to the nature or operation of the remedy, or the validity of the contract, or even, necessarily, to the equities then or now existing between the parties."

If the defendant's first point can be sustained, then with every change in public policy the incidents of vested rights can be modified if only a period of time is allowed to elapse. Should the Henry George theory of land holding be adopted as the policy of the State, it would be possible to enact that after twenty years' possession there shall be a presumption of a conveyance to the State and thereafter the property shall be divested. Individual holding would come to an end and the policy would be vindicated.

On page 2 of defendant's brief he mildly admits the vice of the Act:—

> "When the statute is made retrospective, but it is provided that it shall not go into effect for a reasonable term of years thereafter, the statute, while it does *disadvantage* the owner of a ground rent who had previously failed to make demand for a term of years, does not deprive him of his remedy, and hence does not impair the obligation of the contract."

"Disadvantage" is not a characteristic term to apply to a plaintiff who has been stripped of her property. She has been deprived of her remedy, but with the consoling thought from the Supreme Court of Pennsylvania that the estate which is still in her possession is unimpaired. If the plaintiff has not been deprived of her remedy because she had previously

failed to make demand for a term of years, then the Supreme Court of Pennsylvania does not mean what it says. This is the ground upon which a recovery is denied and is the very thing of which complaint is made.

The statement on page 6 of defendant's brief that no demand has been made for forty years, is without justification. There is not a syllable in the record to this effect. Furthermore, there have never been forty minutes when the plaintiff could demand the principal sum invested in the estate.

In all of the cases cited by the defendant the actions were upon matured liabilities, therein differing from ground rents. Terry *vs.* Anderson, 95 U. S., 628, was an action based upon the statutory liability of stockholders of a bank to secure the redemption of its bills; Koshkonong *vs.* Burton, 104 U. S., 675, was a suit upon overdue coupons of a municipal bond; and Turner *vs.* People, 168 U. S., 90, and Timber Co. *vs.* Roberts, 177 U. S., 323, involved the application of a New York statute allowing two years in which to redeem certain property sold for taxes, which was not to become operative for six months.

The defendant suggests that under the plaintiff's reasoning interest could be recovered on a debt which had been barred, because theretofore there had been no right to demand the interest. The learned counsel has forgotten that interest is but a penalty for delay in payment. If the principal is barred, so is the incident-interest, and no penalty is levied.

It is a very different proposition to argue that because some coupons of a non-matured obligation are barred, that you can bar others not due or divest the estate.

On page 8 the defendant says:—

> "Non-payment of interest may be taken as strong evidence of the extinguishment of the principal. * * * At any rate, it is an attitude which may be declared, in the exercise of legislative discretion, to be inconsistent with the non-extinguishment of the ground rent."

The defendant states this proposition as if it involved the point in issue. The record discloses that the plaintiff at the trial

contended that the Act merely raised a rebuttable presumption and offered to prove affirmatively the non-extinguishment of this rent by payment, but the offer was overruled. The above-mentioned statement is not the doctrine enunciated in Biddle *vs.* Hooven, 120 Pa., 221.

The defendant, on page 8, expresses anxiety lest two hundred and ten years will not bar the remedy and thereby "the Statute of Limitations be avoided." The plaintiff suggests that the defendant, or any of his predecessors in title, could have protected any alleged rights by severing the tenancy and holding adversely for twenty-one years under the Pennsylvania Act of 26th March, 1785; 2 Sm. L., 299, section 2. Until he has discharged his obligation honestly, let him have no thought about the property right subsisting.

At the bottom of page 8 the defendant contends that the legislature can "say to the owner of the ground rent that he must, within twenty-one years, make demand of interest, or it will be conclusively presumed that he had no right to interest, because of the payment of principal." Because some installments of a contract are barred, can it be conclusively presumed that there has been a release before a day of maturity? Can a bar of the plaintiff's right be predicated upon the default of the defendant? The covenant in the deed excuses demand. Ingersoll *vs.* Sargeant, 1 Wharton, 336; St. Mary's Church *vs.* Miles, 1 Wharton, 229.

There is no warrant in the record for the statement on page 9 of defendant's brief that it is highly probable that the *terre*-tenant of this property extinguished this rent, possibly forty-eight years ago, by the payment of $1200. This assertion is made in spite of the fact that plaintiff's offer affirmatively to prove non-payment was overruled in the court below, raising a question which cannot be argued in this court.

The defendant's paraphrase, on page 11 of his brief, of plaintiff's contention, is evasive. Let him add to his second proposition the fact that the estate is not barred. If this is true and if the estate is unimpaired then the barring of some arrears of rent cannot and does not affect the estate. In Campbell *vs.* Holt, 115 U. S., 620, this precise point was ruled.

After an action of debt had been barred the Texas Statute of Limitations was repealed. In holding that the contract was unaffected and that a right of action again accrued, Mr. Justice Miller said in part (page 629):—

> "We can understand a right to enforce the payment of a lawful debt. The Constitution says that no State shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law because its effect is to make him fulfill his honest obligations."

This Act can hardly be said to be "settled law" when it has been doubted by several of the ablest jurists that ever sat upon the bench, and so vigorously denied by the profession. Mr. Justice Kennedy in St. Mary's Church *vs.* Miles, 1 Wharton, 229 (1835), doubted the constitutionality of such an Act should it be adopted; Justice Sharswood did the same in Haines' Appeal, 73 Pa., 169, 173 (1873); and the same can be said of Judge Hare in Hillerman *vs.* Ingersoll, 5 Phila. Reports, 143, 144 (1863). Richard M. Cadwalader, Esq., in his "Law of Ground Rents in Pennsylvania," pages 323–333, condemns the Act; he further vigorously assails it in two articles in *The American Law Register and Review* (published in Philadelphia by the Law Department of the University of Pennsylvania), the first being entitled "Biddle *vs.* Hooven," and appearing in the issue for September, 1896, page 557, vol. XXXV., N. S., No. 9, and the second entitled: "Unconstitutional Legislation Upon the Extinguishment of Ground Rents," and appearing in the January, 1898, issue, page 13, vol. XXXVII., N. S., No. 1.

Furthermore, the Act has never been accepted by the profession; witness the many times it has been assailed in the Appellate Court: Korn *vs.* Browne, 64 Pa., 55 (1870); Biddle *vs.* Hooven, 120 Pa., 221 (1888); Wallace *vs.* Church, 152 Pa., 258 (1893); and this case, Clay *vs.* Iseminger, 187 Pa.,

108 (1898), and the same case again appealed, and reported in 190 Pa., 580 (1899); and Clay *vs.* McCreanor, 9 Pa. Sup. Ct., 433 (1899).

The defendant argues *dehors* the record when he states, on page 11 of his brief: " Thousands of titles have been accepted on the faith of its enforcement and constitutionality." If we may be similarly indulged in argument, we beg to deny this unsupported statement, at least as to rents reserved before 1855. The title companies in Philadelphia refuse to insure against these ground rents. They will protect the grantee from loss if an extra premium is paid and counter indemnity given. Unless these features are present, we know of no case where a full price has been paid for such a title.

GEORGE HENDERSON,
For Plaintiff in Error.

No. 194.

Supreme Court

of

Jeannie [illegible], Administratrix [illegible]

of the Estate of [illegible],

&c., Plaintiffs in Error,

vs.

[illegible]

IN ERROR TO THE [illegible]

OF [illegible]

BRIEF OF DEFENDANTS IN ERROR.

IRA J. WILLIAMS,

ALEX. SIMPSON, Jr.,

For Defendants in Error.

ARGUMENT FOR DEFENDANTS IN ERROR.

I. THE VALIDITY OF THE RETROSPECTIVE APPLICATION OF THIS STATUTE OF LIMITATIONS IS NOT INVOLVED, BECAUSE THE FULL BAR OF TWENTY-ONE YEARS' NON-DEMAND TOOK PLACE AFTER THE ACT.

The ground rent was created January 4th, 1854.

The Act of Assembly was passed by the Pennsylvania Legislature on April 27th, 1855.

This action was brought November 28th, 1896.

The non-demand which made the ground rent irrecoverable was for the period of twenty-one years and upwards immediately prior to bringing suit.

All of this period was *long after* the enactment of the statute.

Under such circumstances the Act is given no retrospective or retroactive effect.

Appellant's counsel concedes, as he must, not only that a valid Statute of Limitations could be enacted to apply to ground rents, but that a statute could be passed to apply retrospectively to ground rents created before its enactment. Under the facts in this case, if the Act is constitutional as to ground rents reserved after its passage, it is also constitutional as to this ground rent. If this suit had been brought in 1859, more than three years after the passage of the Act of 1855, and the defense had been made that there had been no demand by the plaintiff for arrears of ground rent for twenty-one years, or more, then the question as to the reasonableness of the period would have arisen. Applied to such a state of facts, the Legislature would, as to the time prior to the Act of 1855, have been making non-demand of interest evidence against the owner of the ground rent,

in a way in which it had not theretofore been. Applied to such a state of facts, it might properly have been said that the statute was retrospective or retroactive. But here plaintiff's failure to demand interest alleged to have been due was for more than twenty-one years *after the passage of the Act.* Plaintiff in respect of her failure to demand interest is on exactly the same footing as, and in no worse case than, the owner of a ground rent made in 1856, who had failed for twenty-one years prior to beginning suit to make demand for interest, or to secure his rights in the way required by the statute. The only reason why Statutes of Limitations may not in all cases be retrospectively applied, so as to include in the term or period prescribed therein the years of non-demand which have preceded the enactment of the statute, is that thereby, under the guise of barring the remedy, the contract itself would be impaired, because of the taking away of all remedy. If the Legislature provides that no action should be brought upon a ground rent upon which no demand had been made for twenty-one years, and there were such ground rents theretofore created, the holder of the ground rent would be absolutely without remedy, because twenty-one years having elapsed *prior to the passage of the statute*, no suit could be brought, if the Act were upheld. Where the statute is made retrospective, but it is provided that it shall not go into effect for a reasonable term of years thereafter, the statute, while it does disadvantage the owner of a ground rent, who had previously failed to make demand for a term of years, does not deprive him of his remedy, and hence does not impair the obligation of the contract. But no such question at all arises in this case. Plaintiff was not defeated below and will not be defeated here because her ground rent was dated prior to the Act of 1855, and failure had been made to make demand before that time. The date of the ground-rent deed here is immaterial. The reason that plaintiff cannot recover is that *no demand had been made for twenty-one years immediately prior to the commencement of this action.*

If any authority be necessary for so plain a proposition, it will be found in—

Koshkonong *v.* Burton, 104 U. S., 666 (1881).

Mr. Justice Harlan said:—

> "For, if the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is therefore unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire Act would fall and become inoperative. The result, in such case, would be that the plaintiffs and other holders of the coupons would have not simply one year, but, under the construction we have given in force prior to the Act of 1872, to a reasonable time after its passage within which to sue. And if a proper construction of that Act would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained. *For this action was not instituted until more than eight years after the passage of the Act of 1872.* It is, consequently, barred by limitation as to all coupons falling due (and therefore collectible by suit without reference to the maturity of the bonds) more than six years prior to its commencement. The bar was complete more than six years before the revision of 1878 took effect, even if that revision should be deemed to have any application to this action. There is no escape from this conclusion, unless we should hold that the Legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But, neither upon principle nor authority, could that position be sustained."

Even if the period of three years allowed were unreasonable, plaintiff would have been obliged to bring suit within a reasonable time and could not now recover,

unless she can convince the court that forty-two years is a reasonable time.

II. A STATUTE OF LIMITATIONS MAY BE CONSTITUTIONALLY APPLIED TO PRIOR CONTRACTS WHERE, AS HERE, A REASONABLE TIME IS GIVEN AFTER THE PASSAGE OF THE STATUTE BEFORE THE BAR TAKES EFFECT.

In—

Terry *v.* Anderson, 95 U. S., 628 (1877),

Mr. Chief Justice Waite said:—

> "This court has often decided that Statutes of Limitation affecting existing rights are not unconstitutional, *if a reasonable time is given for the commencement of an action before the bar takes effect.* Hawkins *v.* Barney, 5 Pet., 457; Jackson *v.* Lamphire, 3 Pet., 280; Sohn *v.* Waterson, 17 Wall., 596 (84 U. S., XXI., 737); Christmas *v.* Russell, 5 Wall., 290 (72 U. S., XVIII., 475); Sturges *v.* Crowninshield, 4 Wheat., 122. And it is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of an action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain."

In—

Koshkonong *v.* Burton, 104 U. S., 675 (1881),

Mr. Justice Harlan said:—

> "It was undoubtedly within the constitutional power of the Legislature to require, as to the exist-

ing causes of action, *that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose.* The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect: Terry *v.* Anderson, 95 U. S., 633 (XXIV., 366); Hawkins *v.* Barney, 5 Pet., 457; Jackson *v.* Lamphire, 3 Pet., 280; Sohn *v.* Waterson, 17 Wall., 596 (84 U. S., XXI., 737); Christmas *v.* Russell, 5 Wall., 290 (72 U. S., XVIII., 475); Sturges *v.* Crowninshield, 4 Wheat., 122; Osborn *v.* Jaines, 17 Wis., 576; Parker *v.* Kane, 4 Wis., 1; Falkner *v.* Dorman, 7 Wis., 393."

In—

Turner *v.* People, 168 U. S., 89 (1897),

Mr. Justice Gray said:—

"It is well settled that a statute shortening the period of limitation is within the constitutional power of the Legislature, *provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect.* Terry *v.* Anderson, 95 U. S., 628, 632, 633 (24: 365, 366); *In re* Brown, 135 U. S., 701, 705-707 (34: 316, 318)."

In Saranac Land & Timber Co. *v.* Roberts, 177 U. S., 324 (1899), Mr. Justice McKenna, referring to the Turner case, said:—

"The decision establishes the following propositions:—

"1. That Statutes of Limitations are within the constitutional power of a State to enact.

"2. That the limitation of six months was not unreasonable."

The second proviso of the Act of 27th April, 1855, P. L., 368, is as follows:—

> "Provided that this section shall not go into effect until three years from the passage of this Act."

It is difficult to see why the time allowed, of three years, is not a reasonable one. Here the plaintiff would have been in no better case, if the statute had enacted that it should not go into effect for forty years, because, so far as appears, no demand has been made during that time. This court held, in Terry *v.* Anderson, 95 U. S., 628 (1877), that nine and one-half months was sufficient; in Koshkonong *v.* Burton, 104 U. S., 675 (1881), one year was held sufficient; and in Turner *v.* The People, 168 U. S., 89 (1897), and Timber Co. *v.* Roberts, 177 U. S., 323 (1899), six months was held to be not unreasonable. Why is the limitation of three years unreasonable? The plaintiff in error suggests nothing except the palpable fallacy that as to the rents claimed in the statement of claim filed herein the cause of action for any installment presently due did not arise until the rent was payable, and that it could not be barred before it arose. But the same observation would apply to installments of interest claimed on any debt or demand which had been barred by the Statute of Limitations. The plaintiff in such case might well say, "I am not suing for the principal, but for the interest, and until to-day I never had a right to demand this particular installment, because it had not yet fallen due."

If the rent had been reserved more than twenty years before the passage of the Act, and suit had been brought in 1859, more than three years after its enactment, the bar of the statute could be constitutionally applied if no demand had been made for twenty-one years. Under such facts the question as to the reasonableness of the three-year period and the validity of the retrospective application of the Act would have arisen. But here, as already noted, it is immaterial, because the rent was reserved scarcely more than a twelvemonth before the

passage of the Act, and the whole of the twenty-one years' bar accrued *after* the enactment of the statute.

III. A STATUTE OF LIMITATIONS BARRING THE RIGHT OF ACTION AFTER TWENTY-ONE YEARS' NON-DEMAND OF INTEREST IS CONSTITUTIONAL, ALTHOUGH THE PRINCIPAL ITSELF WAS NOT DEMANDABLE.

The rationale of plaintiff's argument moves to this end that inasmuch as there never was in the case of a ground rent the right to demand the payment of the principal, and as the ground-rent landlord's only remedy is in respect of arrears, no statute can validly bar an action as to future accruing rent; that as the law stood prior to the passage of the Pennsylvania Act of 1855, the principal was not barred by failure to demand interest:

St. Mary's Church *v.* Miles, 1 Wharton, 229 (1835).

and that this law could not be changed by statute, because, as the principal itself is not demandable, failure to demand interest may be consistent with the non-extinguishment of the principal.

This deduction from the body of plaintiff's argument is negatived, however, by the concluding paragraph thereof, in which "plaintiff in error suggests that her wrongs can be righted without any legal disturbance of titles which should be protected. The Legislature meets next January, when a proper Act can be adopted limiting actions *sur* ground rents reserved before 1855." From this it would appear that plaintiff's counsel recognizes the impossibility of successfully contending that no valid Statute of Limitations can be passed in respect of ground rents. Indeed, there would seem to be recognized the perfect propriety of passing a Statute of Limitations which would be retrospective in its operation.

Much of plaintiff's argument is answered by the remark that, notwithstanding the peculiar nature of a ground rent, in that the principal itself is not demandable, yet as the right to the interest necessarily grows out of the non-extinguishment and continued existence of the

principal, the non-payment of the interest may be taken as strong evidence of the extinguishment of the principal. If the ground-rent be paid, there is, of course, no right to demand the interest. If the owner of the ground-rent persists for twenty-one years in his failure to demand interest, it cannot be said that this is no evidence of the actual payment of the ground rent. At any rate, it is an attitude which may be declared, in the exercise of legislative discretion, to be inconsistent with the non-extinguishment of the ground rent.

If this were not so, there could be no valid Statute of Limitations as to ground rents. If twenty-one years' non-payment and non-demand is insufficient; if the Legislature cannot legitimately predicate thereon a bar of the remedy, then two hundred and ten years would also be insufficient. By the simple device of making the interest only, and not the principal demandable, the Statutes of Limitation might be avoided, and legal obligations indefinitely perpetuated. If no interest be paid on account of a judgment bond for twenty-one years the right of action thereon is barred. At common law there was a presumption of fact to this effect, which has by statute been crystallized into a presumption of law. Can it be that the rule would be different if the note did not specifically call for the payment of the principal, or if the principal were not payable until default in a certain number of installments of interest? In the case of a ground rent, at common law, no presumption was indeed raised as to the principal, but there was a presumption of fact that the arrears had been paid. "The lapse of twenty years, without demand or payment is evidence from which a jury may presume payment of the arrears of the ground rent."

Lindeman *v.* Lindsey, 69 Pa., 100 (1871).

The Legislature, in order to protect titles to property and prevent the assertion of stale claims, can, in the exercise of its discretion, say to the owner of the round-rent that he must within twenty-one years make demand of

interest, or it will be conclusively presumed that he had no right to interest, because of the payment of the principal.

> "It is a right founded upon a wise and just policy. Statutes of Limitation are not only calculated for repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses":
>
> Campbell *v.* Holt, 115 U. S., 620.

The deed now in question contains the following proviso:—

> "*Provided always, nevertheless*, that if the said Adam Iseminger, his heirs, or assigns, shall and do at any time hereafter pay or cause to be paid to the said Alexander Osbourn, his heirs or assigns, the sum of $1200, lawful money as aforesaid, and the arrearages of the said yearly rent to the time of such payment, then the same shall forever thereafter cease and be extinguished, and the covenant for payment thereof shall become void. * * *"

At any time within the last forty-eight years the *terre* tenant of this property could, by the payment of $1200, have completely extinguished the ground rent. Indeed, it is highly probable that this was done, although it cannot now be proved.

> "The lapse of twenty years without payment is evidence from which a jury may presume payment of the arrears of ground rent. 'Those only,' says Mr. Price, 'who are accustomed to make or read briefs of title in Philadelphia, going back to the time of the first settlement, know how frequently occur ancient rent charges and ground rents, which the owners of the present day never heard of, and *which generally have nō doubt been honestly extinguished;* while making this note the writer has such a single

brief before him for an opinion, in which no less than three such charges occur as blemishes, grants, or reservations more than a century ago, which no person living has any knowledge of.

" 'The law raises a legal presumption that a mortgage on which interest has not been paid for twenty years has been paid and bars the recovery; and why should a ground rent have a greater immunity against the presumption of extinguishment?'

"It will be observed that all these considerations apply most strongly to existing evils where no payment, claim, or demand has been made for thirty, forty, fifty, or one hundred and fifty years, on account of or for any ground rent, and it was a grievance which, after the lapse of three years, the seventh section of the Act of 1855 was intended to put an end to. The Act was 'to amend certain defects of the law for the more just and safe transmission, and secure enjoyment of real and personal estate.' "

Korn *v.* Browne, 64 Pa., 57 (1870).

While the owner of the ground rent may not demand the principal, yet, if the interest is unpaid, he can pursue the property out of which the rent has issued, by suing for arrears, obtaining judgment, issuing execution thereon, and selling the property. Yet, the owner of the ground rent deliberately sleeps upon his rights, which include a claim against the *corpus* of the estate for twenty-one years, or, as in the case of this plaintiff, for more than forty years.

It is submitted that, notwithstanding the peculiar nature of a ground rent, it is the proper subject of a Statute of Limitations and the failure for twenty-one years to demand any interest, which failure in all human experience would only result from the payment of the principal having in fact been made, may properly be followed by a presumption of the extinguishment of the ground rent.

II.

Substantially the whole of plaintiff's argument is founded on the averment in—

Biddle *v.* Hooven, 120 Pa., 221 (1888),

that this Act "does not impair the title" to the rent, but only takes away the remedy for its recovery. The argument seems to be:—

First.—If you do impair the title the Act is unconstitutional, because it is beyond legislative power to thus affect the obligation of the contract; and

Second.—If you do not impair the title, then the Act is unconstitutional, because it is beyond legislative power to debar a man of his remedy on an unimpaired title.

This, if valid, would be a serious difficulty, for it would render unconstitutional every Statute of Limitations. If, in 1890, A. promises B. to pay him a certain sum of money in one year, and B. brings no suit until 1900, at which time he can prove nothing but the original promise, and its non-fulfilment, that promise still exists, but it is unenforcible. Yet, under the argument above, whether it impairs the contract or debars the recovery on the unimpaired contract, it is equally unconstitutional!

For more than thirty years the Act of 27th of April, 1855, P. L., 368, section 7, has been the settled law of Pennsylvania. Thousands of titles have been accepted on the faith of its enforcement and constitutionality. These facts alone raise a strong presumption in its favor. To erase it from the law of Pennsylvania at this late day would have almost a revolutionary effect upon titles in that State. In practice it has resulted in no inconvenience to the owners of ground rents who are reasonably diligent in enforcing their rights. We know of no case in the Pennsylvania books in which any substantial dispute arose as to whether the non-demand had continued for the statutory period. The Act has been unhesitatingly

and beneficially applied in three reported Pennsylvania cases:

Korn *v.* Browne, 64 Pa., 55 (1870);
Biddle *v.* Hooven, 120 Pa., 221 (1888);
Wallace *v.* Church, 152 Pa., 258 (1893);

besides the case at bar:

Clay *v.* Iseminger, 187 Pa., 108 (1898);
Clay *v.* Iseminger, 190 Pa., 580 (1899).

The opinions in these cases fully vindicate the conclusions reached. We will content ourselves with brief quotations from one case.

In—

Wallace *v.* Church, 152 Pa., 258 (1893),

it was said:—

> "By the Act of 1855 the Legislature provided a limitation for ground rents. It is entitled 'An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate.' The first, second, and third sections relate to the law of descents; the fourth and fifth to proceedings in partition; the sixth to presumptions affecting real estate; the seventh declares 'That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable.'
>
> "This section was not to go into effect until three years after its passage, in order to afford opportunity for those who would otherwise be barred by its provisions to bring an action, or secure an acknowledgment from the owner of the land of the continued existence of the ground rent, annuity, or other

charge, and his liability therefor. There was no other exception or reservation in it. It was intended for the protection of the owner of the land, and to remove stale incumbrances appearing on the records by the application to them of the presumption of an extinguishment by the act of the parties after the lapse of twenty-one years without a legal claim or demand made by the owner of the incumbrance, or an acknowledgment made by the owner of the land bound."

And again:—

"The purpose of the Act of 1855 was to relieve titles and facilitate the sale of real estate. * * * If for twenty-one years no payment upon, or acknowledgment of, the ground rent can be shown and no demand for payment has been made, the Act conclusively presumes a release and extinguishment of the incumbrance by the act of the parties, and declares that the rent shall thereafter be irrecoverable."

The judgment of the Supreme Court of Pennsylvania, it is submitted, should be affirmed.

IRA J. WILLIAMS,
ALEX. SIMPSON, JR.,
For Defendants in Error.

Supreme Court of the United States.

No. 193.—October Term, 1901.

Jeannie M. Wilson, Administratrix of the estate of Alexander Osbourne, deceased, Plaintiff in Error,
vs.
Adam Iseminger and Elmer H. Rogers.

In error to the Supreme Court of the State of Pennsylvania.

[April 7, 1902.]

This was an action of assumpsit brought December, 1896, in the Court of Common Pleas, No. 1, of Philadelphia County, by Harvey G. Clay, administrator of the estate of Alexander Osbourne, deceased, against Adam Iseminger, for recovery of arrears of ground rent due on a ground-rent deed between Alexander Osbourne and Jennie M., his wife, and the said Adam Iseminger, dated January 4, 1854. The statement of particulars claimed arrears of ground rent due, under the stipulations of said deed, for the years 1887 to 1896, both inclusive, with interest on each arrear.

On January 27, 1897, one Elmer H. Rogers, having been permitted, as terre-tenant and owner in fee of the lot of ground described in the ground-rent deed, to intervene and defend *pro interesse suo*, filed, under the rules of the court, an affidavit of defense to the whole of the plaintiff's claim, averring that no payment, claim or demand had been made by any one on account of or for any ground rent on the premises described in the said deed, or from any owner of said premises, or any part thereof, for more than twenty-one years prior to the bringing of the suit; that no declaration or acknowledgment of the existence thereof, or of the right to collect said ground rent thereon, had been made within that period by or for any owner of said premises, or any part thereof, and that neither he nor they or any of them within that period ever executed any declaration of no set-off in reference to said ground rent, or recognized its existence in any way, manner, shape or form.

This defense was based on the seventh section of an act of the Commonwealth of Pennsylvania of April 27, 1855, in terms as follows:

"That in all cases where no payment, claim or demand shall have been made on account of or for any ground rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable: *Provided*, That the evidence of such payment may be perpetuated by recording in the recorder of deeds office of the proper county the duplicate of any receipt

therefor, proved by oath or affirmation, to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof, shall be evidence until disproved, and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed: *Provided*, That this section shall not go into effect until three years from the passage of this act."

Thereupon the plaintiff took out a rule on the defendant to show cause why judgment should not be entered against him for want of a sufficient affidavit of defense, assigning as a reason why such rule should be made absolute that the said seventh section of the act of April 27, 1855, was unconstitutional within the tenth section of article 1 of the Constitution of the United States, forbidding any State from passing any law impairing the obligation of contracts.

After a hearing the court discharged the said rule for judgment; a bill of exceptions was signed and sealed, and the cause was then taken to the Supreme Court of Pennsylvania, where the judgment of the Court of Common Pleas was affirmed. (187 Pa. St. 108.)

Thereafter the case came on for trial before the court and a jury. The plaintiff offered evidence tending to show that the ground rent in question had never been paid off and extinguished. This offer was objected to as immaterial and irrelevant. The objection was sustained, and an exception was taken by the plaintiff. The court was asked to instruct the jury that the seventh section of the act of April 27, 1855, was unconstitutional, because it impairs the contract reserving the rent, and was inhibited by the tenth section of article 1 of the Constitution of the United States, which forbids the States from passing any law impairing the obligation of contracts. The request so to charge was refused by the trial judge. The defendants asked the court to charge that the verdict should be for the defendants. This request was granted. A bill of exceptions to the action of the court in rejecting the plaintiff's offer of evidence, in declining to charge as requested by the plaintiff, and in charging as requested by the defendant, was signed and sealed by the trial court. A verdict and judgment in favor of the defendants were then entered. The cause was then taken a second time to the Supreme Court of Pennsylvania, where on April 3, 1899, the judgment of the Court of Common Pleas was affirmed.

Mr. Justice SHIRAS delivered the opinion of the Court.

The question for determination in this case is whether the seventh section of the act of assembly of the Commonwealth of Pennsylvania of April 27, 1855, the terms of which appear in the foregoing statement, is

an act or law impairing the obligation of contracts within the meaning of the Constitution of the United States.

The peculiar character, under the laws of the State of Pennsylvania, of irredeemable ground rents, must first receive our notice.

It is defined to be a rent reserved to himself and his heirs by the grantor of land, out of the land itself. It is not granted like an annuity or rent charge, but is reserved out of a conveyance of the land in fee. It is a separate estate from the ownership of the ground, and is held to be real estate, with the usual characteristics of an estate in fee simple, descendible, devisable, alienable. (*Bosler* v. *Kuhn*, 8 W. & S. 185; *Wallace* v. *Harmstad*, 44 Pa. 495; *McQuigg* v. *Morton*, 3 Wright, 31.)

It may be well to quote the language of the deed reserving the ground rent in question, which is that usually employed in the creation of such estates. The *tenendum* clause is in the usual form: "To have and to hold the said described lot or piece of ground, hereditaments and premises hereby granted with the appurtenances unto the said Adam Iseminger, his heir and assigns, to the only proper use and behoof of the said Adam Iseminger, his heirs and assigns forever." Then comes the reservation, as follows:

"Yielding and paying therefor and thereout to unto the said Alexander Osbourne, his heirs and assigns, the yaarly rent or sum of seventy-two dollars, lawful money of the United States, in half-yearly payments on the first day of April and October every year hereafter forever, without any deduction, defalcation or abatement for any taxes, charges or assessments whatsoever to be assessed as well on the said hereby granted premises as on the said yearly rent hereby and thereout reserved. The first half-yearly payment thereof to be made on the first day of October, one thousand eight hundred and fifty-four, and, on default of paying the said yearly rent on the days and time and in manner aforesaid, it shall and may be lawful for the said Alexander Osbourne, his heirs and assigns, to enter into and upon the said hereby granted premises or any part thereof, and into the buildings thereon to be erected, and to distrain for the said yearly rent so in arrears and unpaid, without any exemption whatsoever, any law to the contrary thereof in anywise notwithstanding, and to proceed with and sell such distrained goods and effects, according to the usual course of distresses, for rent charges. But if sufficient distress cannot be found upon the said hereby granted premises to satisfy the said yearly rent in arrear and the charges of levying the same, then and in such case it shall and may be lawful for the said Alexander Osbourne, his heirs and assigns, into and upon the said hereby-granted lot and improvements wholly to re-enter, and the same to have again, repossess and enjoy as in his and their first and former estate and title in the same and as though this indenture had never been made," &c.

It appears in the Pennsylvania cases, hereinbefore and hereafter cited, that this form of estate was, in the early history of the Commonwealth, a favorite form of investment; but that eventually great inconveniences

arose from the existence of ancient ground rents, which the owners and occupants of the land never heard of, but of whose extinguishment the records of title made no mention. Indeed, the records disclosed the reservation of such ground rents unpaid and unextinguished, going back more than a century. In *Horn* v. *Browne*, (64 Pa. St. 55,) there is a quotation in the opinion from a tract by Mr. Eli K. Price, a distinguished real estate lawyer of Philadelphia, as follows:

"Those only who are accustomed to make or read briefs of title in Philadelphia, going back to the times of the first settlement, know how frequently occur ancient rent charges and ground rents, which the landowners of the present day never heard of, and which generally have no doubt been honestly extinguished; while making this note the writer has such a single brief before him for an opinion, in which no less than three such charges occur as blemishes, grants or reservations more than a century ago, which no person living has any knowledge of."

These evils led to the passage of the act of the 27th of April, 1855, entitled "An act to amend certain defects of the law for the more just and safe transmission, and secure enjoyment of real and personal estate."

The theory of this remedial act is that upon which all statutes of limitation are based—a presumption that, after a long lapse of time, without assertion, a claim, whether for money or for an interest in land, is presumed to have been paid or released This is a rule of convenience and policy, the result of a necessary regard to the peace and security of society.

Bonds, even when secured by mortgages upon land, mortgages themselves, merchants' accounts, legacies, judgments, promissory notes, and all evidences of debt, have universally been treated as lawfully within the reach of legislative power excised by the passage of statutes of limitation. Such statutes, like those forbidding perpetuities and the statute of frauds, do not, in one sense, destroy the obligation of contracts as between the parties thereto, but they remove the remedies which otherwise would be furnished by the courts. Are not the powers of government adequate for this?

"Laws for the preservation and promotion of peace, good order, health, wealth, education, and even general convenience, are supported under the police power of the State. Under these laws, personal rights, rights of property, and freedom of action, may be directly affected, and men may be fined, imprisoned and restrained, and property taken, converted and sold away from its owner. The principle of such laws is most easily perceived and recognized when men are held liable for nuisances and negligences affecting the health and safety of society, when the marriage contract is dissolved, and when property is subjected to charges and sales for matters affecting the public interest and welfare. Beyond this is a wide domain of general convenience where the power is likewise exercised. Thus estates held in joint tenancy and in common may be divided among the tenants, even by conversion and sale; life estates and remainders may

be separated from each other; qualified inheritances expanded into absolute fee, and contingent and executory interests extinguished. What greater reason has the owner of an irredeemable ground rent, coming down from a former generation, to complain, than the owner of a remainder or reversion, or of some contingent or executory interest?" (C. J. Agnew in *Palairet's Appeal*, 17 P. F. Smith, 437.)

"Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the right to assert the same in the courts by his own negligence or laches. If one who is disposed to be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect, and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no legal rights in the premises. Such a statute is a statute of repose. Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time." (Cooley on Limitations, 5th ed. 448; *Bell* v. *Morrison*, 1 Pet. 351: *Leffingwell* v. *Warren*, 2 Black, 606.)

We are unable to perceive any sound distinction between claims arising out of ground-rent deeds and other kinds of debts and claims, which would exempt the former from the same legislative control that is conceded to lawfully extend to the latter.

But, assuming that there is nothing peculiar in ground rents that withdraw them from the reach of statutes of limitation, it is further contended, in the present case, that the act of April 27, 1855, can have no valid application to a ground rent reserved before the passage of that statute. It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. (Cooley on Lim. 451.)

Thus in *Terry* v. *Anderson*, (95 U. S. 628,) it was said per Chief Justice Waite:

"This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. (*Hawkins* v. *Barney*, 5 Pet. 451; *Sohn* v. *Waterson*, 17 Wall. 596.)

"It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.

"In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge, and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts." (*Tanner* v. *New York*, 168 U. S. 90; *Saranac Land Co.* v. *Roberts*, 177 U. S. 44.)

In *Horn* v. *Browne*, (64 Pa. St. 57,) this question was considered, and it was said, per Read, J.:

"The seventh section did not go into effect for three years, and gave ample time to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute. This prospective commencement makes the retrospective bar not only reasonable but strictly constitutional." Citing *Smith* v. *Morrison*, (22 Pick. 430,) and *Ross* v. *Duval*, (13 Pet. 64.)

In *Biddle* v. *Hooven*, (120 Pa. St. 225,) it was said, referring to *Horn* v. *Browne*, (64 Pa. 57,) "an examination of it shows that the only question there argued was whether the section of the act referred to has a retrospective as well as a prospective operation with respect to ground rents. This appears in the first sentence of the opinion of Judge Read. He very properly held that as the seventh section did not go into effect for three years, and gave ample time to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute, that this prospective commencement made the retrospective bar not only reasonable but constitutional. In other words, the act gave ample time to preserve all existing rights. . . . The only ground upon which this kind of legislation can be justified is that after the lapse of the statutory period the mortgage or other security is presumed to have been paid, or the ground rent extinguished. The payment of a mortgage and the extinguishment of a ground rent mean substantially the same thing. The act was not intended to destroy the ground landlord's ownership in the rent;

it does not impair his title thereto; nor can it be said to impair the contract by which the rent was reserved, but from well-grounded reasons of public policy it declares that when the owner of such rent makes no claim or demand therefor for twenty-one years it presumes it has been extinguished, which means nothing more than that it has been paid. The language cited, as before observed, affects only the remedy; if it meant more it would be void for the excess."

The same conclusion was reached by the Supreme Court of Pennsylvania in *Wallace* v. *Fourth U. P. Church*, (152 Pa. St. 258,) where it was said that "the purpose of the act of 1855 was to relieve titles and facilitate the sale of real estate. It fixes upon an arbitrary period of twenty-one years as that over which the search of a purchaser or other person must extend, and beyond which it shall not be necessary for him to look. If for twenty-one years no payment upon or acknowledgment of the ground rent can be shown, and no demand for payment has been made, the act conclusively presumes a release and extinguishment of the incumbrance by the act of the parties, and declares that the rent shall be thereafter irrecoverable." In that case the ground rent had been reserved long before the passage of the act of April 27, 1855, and it was held that as twenty-one years and ten months had elapsed without the payment of rent, or demand for the same, the right to demand it was extinguished.

So, in the present case, where no payment or demand was shown to have been made for more than twenty-one years, it was held that, in view of the numerous and repeated decisions, the question must be considered at rest. (*Clay* v. *Iseminger*, 187 Pa. St. 108.)

We are, therefore, of opinion that the Supreme Court of Pennsylvania did not err in holding that the seventh section of the act of April 27, 1855, was constitutionally applicable, and its judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.